Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

TERRANCE J. FREDERICK,

Petitioner,

v.

KIRBY TANKSHIPS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the penalty wage statute, 46 U.S.C. § 10504, protects seafarers signed to articles by the shipowner aboard vessels engaged in lengthy, coasting voyages?

2. Whether shipowners must pay the actual cost of maintenance, rather than a *de minimis* collective bargaining rate, to sailors who become ill or are injured aboard their ships?

3. Whether shipowners who have violated provisions of their collective bargaining agreements may impose the *de minimis* contractual rate of maintenance upon an ill or injured sailor?

4. Whether a jury must use a reasonable person standard, as opposed to a willful or arbitrary standard, in awarding damages for the aggravation of a sailor's injuries due to a failure to pay maintenance and cure?

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, petitioner Terrance J. Frederick, an individual, was formerly a career chief engineer serving aboard various ships during the 25 years he served at sea. Mr. Frederick is retired from his career at sea and is disabled following the injuries sustained in this case. He lives in Citrus County, Florida. Kirby Tankships, Inc., a shipowner, is listed on the New York Stock Exchange. Its headquarters is located in Houston, Texas.

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PETITION FOR A WRIT OF CERTIORARI

Terrance J. Frederick, a sailor injured aboard ship at sea, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case. Filing fees are waived in seamen's cases. *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 782 (1952).

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a, is reported at 205 F.3d 1277. The Order of the district court denying Defendant's motion for a new trial and for remittitur, App., *infra*, 1b, is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Article 3, § 2 of the United States Constitution.

STATUTORY PROVISIONS INVOLVED

CHAPTER 105 – COASTWISE VOYAGES

> 46 U.S.C. § 10501(a) Except for a vessel to which chapter 103 of this title applies, this chapter applies to a vessel of at least 50 gross tons on a voyage between a port in one State and port in another State (except an adjoining State).

46 U.S.C. § 10502(a) Before proceeding on a voyage, the master of a vessel to which this chapter applies shall make a shipping articles agreement in writing with each seaman on board, declaring the nature of the voyage or the period of time for which the seaman is engaged.

46 U.S.C. § 10504(b) The master shall pay a seaman the balance of wages due the seaman within 2 days after the termination of the agreement required by section 10502 of this title or when the seaman is discharged, whichever is earlier.

(c) When payment is not made as provided under subsection (b) of this section without sufficient cause, the master or owner shall pay to the seaman 2 days' wages for each day payment is delayed.

(d) Subsections (b) and (c) of this section do not apply to:

(1) a vessel engaged in coastwise commerce.

(2) a yacht.

(3) a fishing vessel.

(4) a whaling vessel.

(e) This section applies to a seaman on a foreign vessel when in harbor of the United States. The courts are available to the seaman for the enforcement of this section.

STATEMENT

Mr. Frederick, a seaman and career chief engineer, was injured at sea aboard a mid-sized tanker ship, The Champion, on September 12, 1994. On that day, the ship was steaming north along the Eastern coast of the United States, on a round-trip voyage carrying heating oil to New England which commenced in Pascagoula, Mississippi, steamed to New Haven, Connecticut, and returned to Pascagoula. Mr. Frederick injured his left knee, hips, and back when he fell while crossing a ramp on the ship's main deck which was coated with oil.

The ship arrived in New Haven the next day, September 13. Mr. Frederick received a "not fit for duty" slip from an emergency room physician late that evening. He returned to the ship after treatment, as his replacement, chief engineer Rentz, had not arrived. Mr. Frederick left the ship on the morning of September 14, as Mr. Rentz had reported at 3:00 a.m. that day. Mr. Frederick briefed both Capt. Vogt and Chief Rentz for about two hours on the morning of September 14 concerning repairs to the ship and other engineering matters. He presented to Capt. Vogt the "unfit for duty" statement received from the emergency room physician the night before. Capt. Vogt filled out a discharge paper, back-dating the day of discharge to September 13. When Mr. Frederick requested wages for his work on September 14, Capt. Vogt refused. Capt. Vogt paid Mr. Frederick through September 13. Capt. Vogt, despite Mr. Frederick's repeated requests, would not change the discharge papers to September 14, or pay wages to Mr. Frederick for that day. Capt. Vogt

also refused Mr. Frederick's request to be paid transportation costs to the airport. Mr. Frederick did receive an airline ticket to his home in Florida.

Mr. Frederick is a member of the American Maritime Officers, a labor union. He claimed wages for September 14 pursuant to Article IV, Section 1(c) of the collective bargaining agreement [CBA] which states: "Wages shall be paid on a day for day basis and shall commence on the day the Officer 'turns to' aboard the vessel." Article VI, Section 1(B)(1) of the CBA states, inter alia: "Where an officer is being replaced for any reason and is required to work on the same day as his replacement 'turns to' for work, both Officers shall be paid for that day[.]." Capt. Fox, who had been relieved by Capt. Vogt at 7:00 p.m. on September 13, 1994, was paid for the full day.

On the basis of this record, the members of the jury answered "yes" to Interrogatory 10 on the Verdict Form [*see* App. D]:

> 10. do you find from a preponderance of the evidence that the Defendant has failed to pay earned wages to the Plaintiff or on his behalf (for the day after Plaintiff was declared not fit for duty) to which Plaintiff was legally entitled?

Kirby never paid Mr. Frederick for his work on September 14, 1994.

After leaving the ship on September 14, 1994, Mr. Frederick paid a driver $300.00 to take him to his sister's home in Rawley, Massachusetts, where he stayed three days. He was not reimbursed by Kirby for this transportation expense. His sister drove him to Pittsfield, Maine, to stay with their fatally-ill mother, who died on October

30, 1994. While at his mother's house, Mr. Frederick sought treatment for his injuries. Dr. Sicari treated the knee and recommended that he seek further treatment from Dr. Hottentot, an orthopedic surgeon. Dr. Hottentot discovered that the knee injury had stabilized, but that for the past 10 to 15 years, Mr. Frederick has suffered from a degenerative hip condition. Dr. Hottentot advised Mr. Frederick to undergo a bilateral hip replacement and not to return to work.

Mr. Frederick returned to work aboard The Champion in January of 1995 because he needed money. Kirby had not paid maintenance or unearned wages to Mr. Frederick prior to his returning to sea. His hips caused him constant pain, but he could not take pain medication onboard the ship because Kirby had a policy against drug use by its employees. Due to the pain, Mr. Frederick cut short his tour of duty. A few months later, Kirby terminated Mr. Frederick, alleging that he falsified oil records. After his termination, Mr. Frederick consulted an orthopedic surgeon, Dr. Choung, who replaced the right hip in the Fall of 1995.

Suit was filed in this case on May 23, 1996, the complaint alleging Jones Act claims of negligence, unseaworthiness, maintenance and cure [M & C] for injuries to his left knee, both hips, and back that he suffered in the slip and fall, and lost wages and penalty wages pursuant to 46 U.S.C. § 10504. After a 7 day trial, the members of the jury deliberated 9 hours over two days. Their verdict awarded Mr. Frederick $810,903.80. This award included $525,069.00 for unearned wages and M & C, and $1,242,760.00 for Jones Act negligence and unseaworthiness, adjusted downward by 77% due to Mr.

Frederick's pre-existing hip condition. The district court judge denied Kirby's motion for judgment as a matter of law, or alternatively, motion for a new trial or remittitur. *See* App. B, *infra.*

The 11th Circuit remitted the jury verdict for denial of M & C and unearned wages, and for the aggravation of injuries for the denial of M & C of $525,060.00, to $107,949.43, holding that the maximum figure the evidence supports for M & C and unearned wages is $107,949.43. Mr. Frederick excepts to the remittitur of $417,110.57.

The trial court adopted Kirby's jury instructions for M & C, and Kirby's verdict form. *See* App. C and App. D, *infra.* The M & C instructions state that to award M & C, " . . . the Plaintiff need only show that he suffered injury or illness while in the service of the vessel on which he was employed as a seaman, without willful misbehavior on his part". But, to grant damages for Kirby's failure to pay M & C, which caused aggravation of Mr. Frederick's injuries, the instructions require a "willful and arbitrary" finding.

Kirby's verdict form contained only one question for M & C which combined the damages findings for both M & C and for the consequences due to withholding of M & C. *See* App. D, *infra,* Interrogatories 7 and 8. The 11th Circuit answered the missing question on the verdict form by finding $107,949.43 due to Mr. Frederick for M & C and unearned wages. The 11th Circuit court remitted the balance of the $525,060.00 as the jury's answered "No" to Interrogatory 9 finding Kirby not "willful and arbitrary in their failure to pay maintenance and cure?"

Kirby is not liable for attorney fees which require a finding of willful or arbitrary conduct.[1] Did the 11th Circuit err in equating the legal standard for attorney fees, willful and arbitrary, a standard which also supports an award of punitive damages, to that necessary to find damages for the aggravation of injuries due to withholding M & C? Can the appropriate legal standard seeking damages for injuries sustained due to withholding of M & C be higher than that of a reasonable person, the standard in this case for Jones Act negligence?

Both the trial and appellate courts denied Mr. Frederick's demand to be paid the actual cost of maintenance, about $50.00 per day, as opposed to the contractual [CBA] rate of $15.00 per day. The CBA at Article V, Section 8(A) states: "When an Officer is entitled to maintenance and cure, the Company will compensate the man concerned at the rate of $15.00 per day, to be paid **weekly**." Mr. Frederick was not paid weekly. He received a lump-sum check for maintenance at a rate of $15.00 per day issued in February 1995, five months after his injury. By that time, Mr. Frederick had been forced back to sea for lack of money as Kirby had denied to him unearned wages from September 14, 1994, to October 30, 1994, when he would have left the ship upon the death of his mother, and the *de minimis* $15.00 contractual daily

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[1] The members of the jury used a reasonable person standard to find Jones Act negligence and unseaworthiness. The trial court followed the 5th Circuit's recent decision in *Gautreaux v. Scurlock Marine*, 107 F.3d 331, 339 (5th Cir. 1997) (*en banc*) for Jones Act negligence which imposes a reasonable person standard as distinguished from a "featherweight" standard previously used in the 5th and 11th Circuits.

rate of maintenance. The sums denied to Mr. Frederick were substantial – $23,000.00 in unearned wages [$500 per day x 46 days] and $690.00 in maintenance [$15.00 per day x 46 days]. Had Mr. Frederick been entitled to the actual cost of his maintenance, about $50.00 per day, the amount due him would have been $2,300.00 [$50.00 x 46].

Kirby's personnel officer, Allen Watson, called Mr. Frederick at his mother's home in Pittsfield, Maine, in the third week of October, 1994, about 5 weeks after the injury. Kirby's excuse for the delay is an alleged difficulty in finding Mr. Frederick; however, Kirby's personnel file which contains Mr. Frederick's employment application lists his mother's home and telephone number as a person to contact. Mr. Watson determined that Mr. Frederick was injured and was being treated for his injuries. Despite this, he asked Mr. Frederick to write him a note stating that he did not want to be paid maintenance at that time. Mr. Frederick, who is quite unsophisticated in legal matters, in fact wrote the note requested by Mr. Watson. Kirby has treated the handwritten note as a waiver by Mr. Frederick for immediate payment of M & C, despite Kirby's legal and contractual obligations. Mr. Frederick did not consult counsel at the time he prepared the note. Allen Watson had similarly denied 3rd officer Tara Ziegler, a shipmate of Mr. Frederick, maintenance after she suffered an eye injury. Ms. Ziegler testified at trial that, "Mr. Watson, the human resources manager, came on-board [ship] when I returned and told me twice that he had to pay me this maintenance and then he never did." Kirby did not meet its contractual obligations to pay maintenance to injured sailors in at least these two instances.

Kirby violated its obligations under the CBA to pay Mr. Frederick wages for September 14, 1994, leading to the jury's affirmative finding in response to Interrogatory 10 on the Verdict Form, and had refused to pay Mr. Frederick unearned wages in the 46 day period from the date of the injury, September 14, to the death of his mother on October 30, 1994, when he otherwise would have left the ship. Having disregarded its obligations under the CBA to pay maintenance and unearned wages, should Kirby be permitted to limit its maintenance payments to the *de minimis* contractual rate of $15.00 per day? The 11th Circuit dodged this issue, expressly leaving it for another day. Should other injured sailors wait longer for an answer to this issue given the evidence of mistreatment by a shipowner to this injured sailor?

Before falling aboard ship on September 12, 1994, Mr. Frederick had been in reasonably good health, despite the pre-existing osteoarthritis resident in his hips. He was able to perform his duties without taking any pain medication, and could even do heavy physical labor. For example, Mr. Dukel, the 3rd engineer, testified that he saw Mr. Frederick climb down a 50' ladder to perform a repair, and Ms. Zeigler, the 3rd officer, saw him climb up a 12' mast to reseat a high-velocity valve, a task which requires great strength. After the injury of September 12, 1994, Mr. Frederick's health was broken. He was in great pain after being forced by penury to return to sea. However, he was forced to leave the ship prior to the end of his tour of duty due to the extreme pain from his injured

hips. After his discharge by Kirby,[2] the right hip was replaced successfully by Dr. Choung, an orthopedist. Neither Kirby nor the union medical plan paid for the operation, each playing the "catch-22" game. Kirby stated that the injury was not work related; the union refused to pay stating that the injury was work related. Mr. Frederick's union medical plan initially had authorized payment for the operation which cost about $37,000, but reneged after the operation stating that its policy limits for payment had been exceeded. The bill remains unpaid to this day.

Dr. Choung recommended that the left hip be replaced as well in February 1996. The operation was delayed for two and a half years due to Mr. Frederick's inability to pay for it.[3] Extensive testimony was taken at trial from Dr. Choung, and from Dr. Figueroa, Mr. Frederick's family physician, concerning the pain and suffering of Mr. Frederick due to the delay in medical treatment. A bad hip is among the most painful of human ailments. Drs. Choung and Figueroa testified that Mr. Frederick struggled to limit weight gain in the face of an inability to exercise, and their prescribing pain killers,

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[2] Mr. Frederick sued Kirby alleging a violation of the Americans With Disabilities Act. This suit has been resolved. The district court has deferred consideration of a second M & C lawsuit filed by Mr. Frederick for relief from the date of the jury verdict until Mr. Frederick achieves maximum medical cure. An injured seaman may bring serial suits to collect maintenance payments as they come due. *Pelloto v. L & N Towing Company*, 604 F.2d 396, 401 (5th Cir. 1979).

[3] Mr. Frederick qualified for social security disability and, after another two years, for medicare. Medicare paid for the second hip operation.

including 4 to 6 Percocet daily, on a long-term basis, which would not have been necessary if the hip had been replaced in February, 1996, when recommended by Dr. Choung. In these circumstances, should the 11th Circuit have reversed a jury verdict for damages which was based upon substantial evidence acceptable to a reasonable person?

SUMMARY OF ARGUMENT

1. The 11th Circuit erred in holding that penalty wages cannot be paid to sailors who ship on any Chapter 105 voyages, irrespective of their length or duration. For the past 125 years, sailors who ship on lengthy, coasting voyages which require the signing of articles have been protected from a shipowner's arbitrary refusal to pay wages to them within 2 days of their discharge from the ship. This protection should not be abrogated absent clear Congressional intent.

2. The lower courts are in disarray in deciding whether to enforce contractual maintenance clauses which cap the rate of maintenance at *de minimis* levels of $8 to $15 per day. Is the obligation to pay maintenance contractual or legal in nature? Courts which find maintenance to be a contractual obligation defer to the CBA rate, holding that the sailor is the beneficiary of the *quid pro quo* of collective bargaining. Courts which deem maintenance to be a legal obligation strike down the CBA rate and place the injured or ill sailor in the same position as non-union sailors who may enforce in court their actual costs of

maintenance. Does the historic law of maintenance establish a floor for both unionized and non-union sailors which entitles them to be paid the actual cost of providing food and lodging? As in other like and related areas of the law such as minimum wage or worker's compensation benefits, can maintenance be deemed a floor from which a union may bargain increased benefits?

3. Shipowners who deprive their injured or ill sailors of maintenance and cure and who breach their obligations under a CBA should not be given the benefit of the contractual *quid pro quo*. Having failed to abide by the CBA themselves, they should not be allowed to enforce the *de minimis* contractual rate of maintenance of $8 to $15 per day upon the injured or ill sailor who should receive the actual value of the cost of providing food and lodging.

4. The 5th, 9th and 11th Circuits have issued pattern jury instructions followed by the federal district courts which require a finding of willful, arbitrary or callous disregard of a shipowner's obligation to pay maintenance as a prerequisite to granting consequential damages for the denial of M & C. The 11th Circuit erroneously applied this higher standard, rather than a reasonable person standard, in remitting $411,000 from the jury's verdict in this case. The confusion in the law in this area prejudices injured or ill sailors seeking their rights under the law and is ripe for review.

REASONS FOR GRANTING THE PETITION

A. DO PENALTY WAGES APPLY TO ANY VOYAGES SUBJECT TO CHAPTER 105?

Mr. Frederick's injury occurred during trip 003 of The Champion, a round trip, "coasting" voyage commencing at Pascagoula, Mississippi, traversing the Gulf of Mexico, around the Florida Keys, up the Eastern United States to New Haven, Connecticut, where a cargo of heating oil was discharged, and then returned via the same route to Pascagoula. Capt. Vogt denied to Mr. Frederick a day's pay for September 14, 1994, even though Mr. Frederick worked a portion of that day and was entitled under the CBA's terms to a full days' pay. Capt. Vogt refused to pay Mr. Frederick's costs of surface transportation to the nearest airport after he left the ship, which normally are a subject to penalty wages. *Mateo v. M/S Kiso,* 805 F.Supp. 761 (N.D.Cal. 1991). The members of the jury determined that Mr. Frederick should have been paid for September 14. *See,* App. D, Interrogatory 10. However, the 11th Circuit and the trial court ruled that penalty wages do not apply to **any** voyage subject to Chapter 105.

In 1983, Congress amended the penalty wage statute to extend its reach to all voyages, including voyages local in nature, and certainly "coasting" voyages which are defined by the statute as " . . . a voyage between a port in one State and a port in another State (except an adjoining State)." *See,* 46 U.S.C. § 10501(a). In the recodification of the maritime laws by Congress in 1987, the Congress returned the maritime statute to its original roots:

> In the case of the act revising title 46, United States Code, it was the stated purpose of Congress to make no substantive changes of a controversial nature or changes that would be a significant change in maritime policy that would adversely affect any rights, benefits or duties of those impacted. Nonetheless, during the recent recodification of title 46, a wage penalty exemption statute which had existed since 1872 (46 U.S.C. § 544) was repealed and not re-enacted . . . . Since the rights of the parties had arguably been altered by the recodification effort, the Congressional intent as expressed during reconsideration of the relevant legislation had not been achieved.

S.Rep. No. 26, 99th Cong., 1st Sess. 2, 4, *reprinted in* 1985 U.S.C.C.A.N. 25, 26, 28. The intent in 1987 was to return the penalty wage statute to its prior status. Thus, every case which interpreted the penalty wage statute prior to 1983 and after 1987 may apply here.

The penalty wage statute requires seamen to be paid in full within two days after they are discharged from the ship. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 576 (1982).[4] The penalty wage statute must be liberally construed in favor of seamen. *Johnson v. Isbrandtsen Co., Inc.*, 190 F.2d 991, 993 (3rd Cir.), *aff'd* 343 U.S. 779 (1951). The 11th Circuit rejected many years of precedent in which

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[4] The penalty wage statute is one of the first examples of legislation to protect workers in commerce. Since 1872, the statute has deterred shipowners from casting injured sailors ashore far from their homes without proper payment of wages. *Collie v. Ferguson*, 281 U.S. 52, 55 (1930).

penalty wages were awarded to sailors aboard ships sailing on "coasting" voyages. *See Gardiner v. The L.N. Danzler*, 177 F.Supp. 736, 740 (E.D.Va. 1959), *aff'd*, 281 F.2d 719 (4th Cir. 1960) (applying the penalty wage statute to "port-to-port" voyages, not local in nature, for which the shipowner requires the signing of articles by the seafarer); *Johnson v. Offshore Tankers Service, Inc.*, 789 F.2d 1417 (9th Cir. 1986) (voyage from California to Dutch Harbor, Alaska); *Mystic S.C. Co. v. Stromland*, 20 F.2d 342 (4th Cir. 1927), *cert. denied*, 276 U.S. 618 (1928) (voyage from Hampton Roads to New England ports); *Trintafilas v. Newtex Steamship Co.*, 1930 AMC Cases 815 (4th Cir. 1930) (voyage from Newport News to other ports on the Eastern Seaboard); *The Lake Gaither v. Newtex S.S. Corp.*, 40 F.2d 31, 34 (4th Cir. 1940) (voyage from New York to Newport News and other Atlantic ports before returning to Norfolk).

The 11th Circuit rejected Mr. Frederick's penalty wage claim based upon the Champion's "coasting" voyage from the Gulf of Mexico to the Eastern Seaboard and return. *Carson v. Gulf Oil Corp.*, 123 So.2d 35 (Fla.App.Ct. 1960) (involving a voyage from the Gulf Coast in Texas to the Atlantic Coast in Florida.) *Carson* states: "it is a matter of common knowledge that the Gulf of Mexico, between the west coast of Florida and the Texas coast, is by no means of speaking a sheltered body of water such as a harbor or coastal waterway." *Id.* at 39. *Carson* distinguished between voyages local in nature and longer "coasting" voyages. Recently, a trial judge applied the penalty wage statute to a voyage of a ship sailing from Florida to Texas and then to Louisiana. Citing *Carson*, the judge found that a voyage traversing the Gulf of Mexico, which is not a sheltered body of water such as a harbor or

coastal waterway, is not within the coastwise commerce exception. *Solvang v. Plan Kristine*, 1994 AMC Cases 1133, 1139-42 (S.D.Tex. 1993). If a voyage is lengthy, from "port-to-port", and through a major body of water, as distinguished from trips in and around a harbor or sheltered waterway, does the penalty provision in Chapter 105 apply?

The term "coasting voyage" appeared in the predecessor statute, 46 U.S.C. § 596, but is not used in the recodified statute, 46 U.S.C. § 10504. In *Thaxter v. City of New York*, 707 F.Supp. 757 (S.D.N.Y. 1989), the court stated that the "port-to-port" language in § 10504(a) codified existing law interpreting "coasting voyage" and reasoned that had Congress intended to substantively change the law in enacting § 10504, it would have explicitly indicated that the use of the term "port-to-port" is different than "coasting voyage". Since it did not do so, the court concluded that lengthy, "coasting" voyages which require the signing of articles differ from the voyages of vessels which are in or about a harbor and local in nature. Do the "coasting" cases remain viable precedent in accord with the statutory interpretation set forth in *Thaxter*?

The 11th Circuit violated the rules of statutory construction in using a subsection in the penalty wage statute to exclude all "coastwise" voyages from protection. While subsection (d)(1) which states that "a vessel engaged in coastwise commerce" is not within the penalty wage provision, that subsection does not affect voyages which require the signing of articles. *Compare*, 46 U.S.C. § 10504(d) *with* 46 U.S.C. § 10501. The 11th Circuit erred in rendering the penalty wage provisions of Chapter 105 to be mere surplusage. Following the rule of *ut res magis valeat quam pereat*, a court must construe a statute to

uphold rather than to invalidate its mandate. *Eibel Process Co. v. Minnesota & Ontario Paper Co.*, 261 U.S. 45, 63 (1923). If Congress intended to place the penalty wage statute in the same posture as prior to 1983, where the law applied to lengthy, "coasting" voyages requiring the signing of articles, would the Congress wipe out 125 years of precedent except by intent, clearly expressed? The Congress retained the penalty wage provision in Chapter 105. Does subsection (d)(1) exclude only voyages local in nature from the penalty wage provision? Would this construction give meaning to the penalty wage provision in Chapter 105?

B. ARE ILL OR INJURED SAILORS WHO ARE REPRESENTED BY UNIONS ENTITLED TO THE PROTECTION OF THE HISTORIC LAW OF MAINTENANCE?

The *de minimis* maintenance rates set forth in collective bargaining agreements, which generally range from $8 to the $15 per day rate in this case, have been described by two commentators as providing subsistence representing barely one third of the poverty rate in the United States. *See* Brodsky & Houston, *From Subsistence to Starvation: A Call for Judicial Reexamination of Gardiner v. Sea Land Service, Inc.*, 9 U.S.F. Maritime L.J. 71, 81 (1996). The commentators prediction that an injured or ill seaman may be forced to seek welfare assistance, or the charity of family or friends, if available, occurred in this case.

Mr. Frederick left The Champion after his injury to stay initially with his sister, and then with his ill mother.

He was forced to return to sea, when he should have been resting, by lack of money, as Kirby had not paid either maintenance or unearned wages to him. The union's medical plan initially had authorized payment for the hip operation, which cost $37,000, but ultimately refused to pay, stating that the injury was work related. Kirby did not pay either claiming that the injury was not work related.[5] The bill remains unpaid to this day.

The decisions of the lower courts have split along three lines in dealing with the unrealistic, *de minimis*, rates of maintenance set forth in the typical CBA:

1. Several courts have determined that maintenance is contractual in nature, upholding the *de minimis* bargained for rate set forth in the CBA relying upon the broad policies underlying federal labor laws to support their conclusions. *Gardiner v. Sea-Land Serv., Inc.*, 786 F.2d 943 (9th Cir.) (Judge Fletcher dissenting), *cert. denied*, 479 U.S. 924 (1986); *Macedo v. F/V Paul and Michelle*, 868 F.2d 519 (1st Cir. 1989); *Baldassaro v. United States*, 64 F.3d 206 (5th Cir. 1995), *cert. denied*, 517 U.S. 1207 (1996); *but see McWilliams v. Texaco, Inc.*, 781 F.2d 514 (5th Cir. 1986) (reversing the district court's enforcement of the CBA's $8 per day rate). *Gardiner* argues "that maintenance and cure is a contractual obligation subject to negotiation, that . . . national labor policy require[d] enforcement of the collective bargaining agreement, and that the collective bargaining process contained sufficient *quid pro quo* for the

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[5] M & C is not workman's compensation insurance. A shipowner must pay M & C for any injury which occurs or any illness which manifests itself while the seaman is under articles. G. Gilmore & C. Black, *The Law of Admiralty* @ 6-6 (2d ed. 1975).

low maintenance rate." The 11th Circuit in this case concurred, applying the *de minimis* $15 per day rate set forth in the CBA, and stating that the changed circumstances of unionized seamen undercuts the rationale supporting the traditional right to M & C.

2. The courts that have determined that the obligation to pay maintenance is legal rather than contractual in nature have invalidated the *de minimis* CBA provisions. *Barnes v. Andover Co., L.P.*, 900 F.2d 630, 640 (3rd Cir. 1990) adopted the dissent of Judge Fletcher in *Gardiner*, determining that the continued protection of the law is necessary to seamen because of longer voyages with shorter turn-around time, and that a vessel is still a lonely, friendless habitat. Maintenance of $8 per day was deemed insufficient to provide the requisite food and lodging. Thus, *Barnes* did not reach the *"quid pro quo"* argument in *Gardiner*. Alaska's Supreme Court explicitly rejected the 9th Circuit's *Gardiner* decision, adopting *Barnes*, thus creating forum shopping possibilities for sailors in Alaska. *Brown v. State of Alaska*, 816 P.2d 1368 (1991). Trial courts in the 2nd Circuit have invalidated maintenance clauses providing living expenses proven to be inadequate as determined by submitted evidence. *Gillikin v. United States*, 764 F.Supp. 261 (E.D.N.Y. 1982) ("[w]here the payments . . . are in fact insufficient to provide that quality of food and lodging, the right to maintenance must be said to have been abrogated rather than merely modified."); *Gajewski v. United States*, 540 F.Supp. 381 (S.D.N.Y. 1982); *Brown v. United States*, 882 F.Supp. 1424 (S.D.N.Y. 1995) (awarding $36.67 per day maintenance); *Bacher v. Transoceanic Cable Ship Co.*, 1998 U.S. Dist. LEXIS 18476

(S.D.N.Y. Apr. 09, 1996); *Daniels v. Standard Marine Transp. Serv., Inc.*, 680 N.Y.S.2d 41 (N.Y.S.App.Term 1998).

3. A number of courts have held that the law of maintenance establishes a judicially-created floor below which the unions and shipowners may not negotiate. The 6th Circuit in *Al-Zawkari v. American Steamship Co.*, 871 F.2d 585 (6th Cir. 1989), enforced a CBA maintenance rate of $8 in circumstances where a medical bill of $205,000 had been paid in full, but stated that a lower rate would not be upheld. *Accord, Dowdle v. Offshore Express, Inc.*, 809 F.2d 259, 263-64 (5th Cir. 1987) ("There is a fundamental difference between contractual regulation of the rate of maintenance payments and contractual elimination of such payments altogether."); *Rutherford v. Sea-Land Serv., Inc.*, 575 F.Supp. 1365 (N.D.Cal. 1983); *Grove v. Dixie Carriers, Inc.*, 553 F.Supp. 777 (E.D.La. 1982). "[N]o reasonable person could even suggest that $8 is sufficient to pay for the costs that maintenance is designed to pay . . . there simply is no denying that the contractual rate is so low that the right to maintenance effectively has been abrogated." *Brown v. United States*, 882 F.Supp. 1424 (S.D.N.Y. 1995). The *Brown* court reasoned that "a collective bargaining agreement . . . may set a floor under maintenance", but should not be allowed to "impose a ceiling". *Id.* at 1426-27. The Supreme Court of Washington in *Lundborg v. Keystone Shipping Company*, 138 Wash.2d 658, 668 (Wash. 1999) explicitly rejected *Gardiner*, holding that " . . . invalidating collective bargaining provisions that abrogate the right to maintenance does not amount to an assault on the federal policy favoring collective bargaining." The court drew analogy to the minimum wage law

and worker's compensation laws which supercede provisions of a CBA, and which establish a floor for benefits. *Id.* at 669. The Washington court's explicit rejection of *Gardiner* provides sailors a choice of forum in that state.

Maintenance is a benefit most seafarers hope not to receive, as opposed to wages which all workers desire to maximize. *Brown,* 882 F.Supp. at 1426. A union's bargaining demands reflect its members' desires for immediate gratification in the form of higher wages rather than money set aside for injuries which might never occur. *Id.* One district judge observed that the daily rate of maintenance of $8 had not been subject to actual bargaining, but was treated by the unions as a "throw away" provision. *See Barnes v. Apex Marine Corp.,* 1989 AMC 2919 (E.D.Pa. 1989), *aff'd sub nom. Barnes v. Andover Corp.,* 900 F.2d 630 (3rd Cir. 1990). The right to M & C cannot be contracted away. *De Zon v. American President Lines, Ltd.,* 318 U.S. 660, 667 (1943); *Cortes v. Baltimore Insular Line, Inc.,* 287 U.S. 367, 371 (1932). Absent this prohibition, unions might have bargained away all rights to maintenance in exchange for higher pay simply because that is what their members desire.

The federal courts are the protectors of " . . . the rights of seamen and are not without knowledge in this area." *U.S. Bulk Carriers, Inc. v. Arguelles,* 400 U.S. 351 (1971) (refusing to require seamen to use the grievance-arbitration provision of a CBA as their exclusive recourse in enforcing their rights to M & C); *Merchant v. American S.S. Co.,* 860 F.2d 204, 211 (6th Cir. 1988) (The NLRA does not bar a sailor's maritime claim under the Jones Act

alleging a retaliatory discharge, a right to which exists " . . . independent of any collective bargaining agreement.").

Sailors not represented by a union may enforce a realistic rate of maintenance payment by submitting evidence of their costs to the court. *See Yelverton v. Mobile Laboratories, Inc.*, 782 F.2d 555, 558 (5th Cir. 1986); *Incandela v. American Dredging Co.*, 659 F.2d 11, 14 (2nd Cir. 1982) (granting $26.80); *McMillan v. Tug Jane A Bouchard*, 885 F.Supp. 452, 465 (E.D.N.Y. 1995) (granting $40 per day).

Should the historic law of maintenance, which has required shipowners to provide a realistic payment to ill or injured sailors, be deemed a floor for all sailors, whether represented by a union or not? If so, can analogy be made to decisions of this Court upholding a state statute requiring certain minimum mental care benefits which was deemed as not inconsistent with ERISA or with provisions of the NLRA? *See, e.g., Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985); *Ft. Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987) (After conceding that the state statute providing welfare benefits "gives employees something for which they otherwise might have to bargain," this Court explains that "[b]oth employers and employees come to the bargaining table with rights under state law that form a 'backdrop' for their negotiations." *Id.* at 21, quoting *Metropolitan Life*, 471 U.S. at 757, and *Taggert v. Weinacker's Inc.*, 397 U.S. 223, 228 (1970).

C. A SHIPOWNER WHO VIOLATES CBA TERMS SHOULD NOT BE ENTITLED TO THE *"QUID PRO QUO"* OF THE CONTRACTUAL RATE OF MAINTENANCE.

Admiralty law uses equitable principles in treating sailors as wards of the court. *Cortes*, 287 U.S. at 377. Kirby breached Article V, Section 8(A) of the CBA by failing to pay maintenance to Mr. Frederick weekly. Kirby breached Article IV, Section 1(c) and Article VI, Section 1(B)(1) of the CBA by failing to pay Mr. Frederick wages for his work on September 14. *See* App. D, Interrogatory 10, the jury's finding that wages should have been paid. Kirby has failed to honor its legal and contractual obligations to Mr. Frederick to pay M & C causing him penury, delay in receiving medical care, and substantial misery.

Should a shipowner receive the contractual benefit of a *de minimis* bargained maintenance rate when the shipowner itself breaches the agreement? As *Barnes* suggests, the so-called safety net offered to seamen by the maritime industry is full of holes. Kirby ignored Mr. Frederick's medical bills, the union medical plan refused to pay, and the union bargained maintenance down to a pittance. Mr. Frederick was forced back to sea due to a lack of money when he should have been resting and receiving treatment for his injuries. Should a shipowner be permitted the benefit of the CBA's *quid pro quo* in these circumstances. *Cf. Vaughan v. Atkinson*, 369 U.S. at 532.

The very case relied upon by the 11th Circuit in adopting the CBA maintenance rate of $15, *Baldassaro*, emphasized that "[T]his court will not lightly embrace the repudiation of contractual obligations enumerated in

a collective bargaining agreement and will 'choose the rule that will promote the enforcement of collective bargaining agreements.' " *Baldassaro,* 64 F.3d at 212-13. The other courts affirming the contractual rate of maintenance state clearly that the sailor has received the benefits of the agreement, the *"quid pro quo". Gardiner v. Sea-Land Service, Inc.,* 786 F.2d at 949; *Al-Zawkari v. American Steamship Co.,* 871 F.2d at 587; *Macedo v. F/V Paul & Michelle,* 868 F.2d at 522. The 3rd Circuit in *Barnes* awarded the actual cost of maintenance to the injured sailor despite the arguments of the industry that the CBA served to protect the sailor. *See Barnes v. Andover,* 900 F.2d at 636. In this case, the CBA's provisions did not protect the seafarer. Should Kirby receive the CBA's benefits given the consequences of its numerous contractual violations?

Insistence upon equitable treatment of an ill or injured sailor is hardly novel. Seamen are treated as wards of the court. *The Osceola,* 189 U.S. 158 (1903). In equity, should the law protect the ill or injured sailor by requiring the payment of the actual cost of maintenance in cases where the sailor has not received the full measure of the bargain of the CBA? Kirby's contractual breach forced this injured seafarer back to sea due to a lack of money. In these circumstances, should Mr. Frederick be entitled to be paid the actual rate of maintenance rather than the *de minimis* contractual rate?

D. WHAT IS THE CORRECT LEGAL STANDARD FOR AWARDING CONSEQUENTIAL DAMAGES FOLLOWING THE SHIPOWNER'S DENIAL OF M & C?

The Iroquois, 194 U.S. 240 (1904), held that the failure of the shipowner to pay M & C may give rise to a claim for damages for the suffering and for the physical handicap which follows. In *Cortes*, 287 U.S. at 371, this Court reaffirmed that a remedy is available to a seafarer " . . . if the injury has been suffered through breach of the duty to provide him with 'maintenance and cure' ". *Cortes* described the standard as being " . . . legal, i.e., imposed by law; that it shall have been imposed for the benefit of the seaman, and for the promotion of his health and safety; and that the negligent omission to fulfill it shall have resulted in damage to his person." *Id.* at 377-78. Thus, *Cortes* appears to establish a legal standard of negligence as a basis for the remedy.

A great deal of confusion as to the legal standard may have been caused by a misreading of *Vaughn*, 82 S.Ct. at 530-31, where the shipowners were described as being " . . . callous in their attitude, making no investigation of libelant's claim and their silence neither admitting or denying it. . . . The default was willful and persistent." This language in *Vaughn* most likely relates to the standard necessary for the award of counsel fees incurred in bringing the action. *Accord, Hines v. LaPorte, Inc.*, 820 F.2d 1187, 1189 (11th Cir. 1987); *but see Jordan v. Norfolk Dredging Co.*, 223 F.Supp. 79 (E.D.Va. 1963) where Judge Michie did not require proof of defendant's attitude as callous in

order to award attorney fees; that attorney fees are "necessary expenses" if the defendant fails to make M & C payments:

> As I read the *Vaughn* case, counsel fees have now been brought within the sphere of consequential damages in maintenance and cure actions. And therefore all I need to determine is that maintenance and cure was owed. That being the case, payment of such counsel fees as had to be paid in order to collect the amount due became an automatic obligation of the shipowner in the same manner as compensatory damages for aggravated injury due to non-payment of maintenance and cure is an automatic obligation.

Kirby's jury instructions state that an arbitrary or capricious standard is required to find damages for the aggravation of injuries due to denial of M & C.[6] *See* App. C. The correct legal standard is that used for Jones Act negligence. *See Morales v. Garijak, Inc.*, 829 F.2d 1355, 1359 (5th Cir. 1987) (criticizing the 5th Circuit's own pattern jury instructions as stating incorrectly the standard for compensatory damages in terms of the standard for punitive damages or attorney's fees.); *Gaspard v. Taylor Diving & Salvage Co.*, 649 F.2d 372, 375 n. 4 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982). As the court stated in *Morales*:

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[6] Kirby's based its instructions upon the 5th and 11th Circuits' pattern jury instructions which in error state a willful, arbitrary or callous standard for the consequences of denying M & C. The 9th Circuit's pattern jury instructions uses similar language, as does the major treatise in this area, Devitt, Blackmar & Wolff, *Federal Jury Practice and Instructions*, 4th Ed., which compounds the error.

> Adopting the higher standard of fault for compensatory damages claims would require not only a misapplication of decisions by the Supreme Court, this circuit, and other circuits n10 [*Vaughn*, 369 U.S. at 530; *Cortes*, 287 U.S. at 371; *Gaspard*, 649 F.2d at 375; *Kraljic v. Berman Enters., Inc.*, 575 F.2d 412, 413 (2nd Cir. 1978); *Neville v. American Barge Line Co.*, 276 F.2d 117, 120 (3rd Cir. 1960). *See also* G. Gilmore & C. Black, The Law of Admiralty @ 6-13, at 311 (2d ed. 1975).] but also an outcome at odds with general legal doctrine. Neither in tort nor in contract law must a plaintiff prove arbitrary and capricious or callous behavior in order to recover reasonably foreseeable damages that have resulted from the breach of a duty owed him; n11 [Restatement (Second) of Torts @ 910 (1977); Restatement (Second) of Contracts @ 346 (1979)] to require such a showing would provide insufficient incentive for individuals to fulfill their legal obligations. Because of the incorrect instructions, Morales was required to bear too heavy a burden in order to recover compensatory damages.

Morales, 529 F.2d at 1369; *Deisler v. McCormack Aggregates Co.*, 54 F.3d 1074, 1085 (3rd Cir. 1995) (holding " . . . that consequential damages are allowed in a claim for maintenance and cure in order to make the injured seaman whole, and they are not dependent upon a showing of bad faith.").

In this case the 11th Circuit applied the wrong legal standard in remitting a jury verdict for consequential damages for failure to pay M & C because the jury did not find evidence of willful or arbitrary conduct. Kirby had appealed from the decision of the trial judge who

had rejected Kirby's motion for remittitur. The trial judge ruled that the members of the jury appropriately had applied a reasonable person standard, and that their denial of a finding of willful and arbitrary conduct addressed the issue of attorney fees. *See* App. B. Because the tort-like M & C action in this case involves a personal injury, it overlaps with the personal injury coverage of the Jones Act. *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1511 (5th Cir. 1995) (*en banc*), *cert. denied*, 516 U.S. 1154 (1996). The trial judge had adopted Kirby's jury instructions for Jones Act negligence which required a reasonable person standard, rather than a "feather-weight" standard. *Gautreaux v. Scurlock Marine*, 107 F.3d 331, 339 (5th Cir. 1997) (*en banc*). Should the standard to prove consequential damages for M & C be any higher?

Was Kirby in fact harmed by the jury's finding of consequential damages in a case where Kirby asked the jury to apply a higher standard of proof than was warranted? Should this matter be heard in order to correct the confusion occurring below which has ill-served Mr. Frederick and other ill or injured sailors?

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

NICHOLAS E. KARATINOS, ESQ.
Counsel for Petitioner,
Terrance J. Frederick

APPENDIX A

Terrance J. FREDERICK,
Plaintiff-Appellee, Cross-Appellant,

v.

Kirby TANKSHIPS, INC.,
Defendant-Appellant, Cross-Appellee.
Terrance J. Frederick, Plaintiff-Appellee,

v.

Kirby Tankships, Inc., Defendant-Appellant.

Nos. 98-2734, 99-2457.

United States Court of Appeals,
Eleventh Circuit.

March 8, 2000.

Brendan P. O'Sullivan, Fowler, White, Gillen, Boggs, Villareal & Banker P.A., Tampa, FL, for Kirby Tankships, Inc. in docket No.-98-2734.

Allen Von Spiegelfeld, Fowler, White, Gillen, Boggs, Villareal & Banker P.A., Tampa, FL, for Kirby Tankships, Inc.

Nicholas E. Karatinos, Theodore (Ted) Karatinos, Seeley & Karatinos, P.A., St. Petersburg, FL, for Terrance J. Frederick.

James Michael Taylor, Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., Tampa, FL, for Kirby Tankships, Inc. in docket No. 99-2457.

Appeals from the United States District Court for the Middle District of Florida.

Before DUBINA, Circuit Judge, KRAVITCH, Senior Circuit Judge, and NESBITT*, Senior District Judge.

DUBINA, Circuit Judge:

This case involves an appeal from a jury verdict in favor of Plaintiff/Appellee/Cross-Appellant, Terrance J. Frederick ("*Frederick*"), on his claims for Jones Act negligence, unseaworthiness, maintenance, cure, and unearned wages arising from injuries Frederick received from a slip and fall while aboard the ship "Champion." Kirby Tankships, Inc. ("Kirby"), Defendant/Appellant/Cross-Appellee, presents seven issues for appellate review: (1) whether the jury's damages award for unearned wages, maintenance, and cure was excessive; (2) whether the district court erred in denying Kirby's motion for judgment as a matter of law on the issue of maintenance and cure; (3) whether the district court erred in not giving a limiting instruction as to the evidence on Frederick's termination; (4) whether the district court abused its discretion by not granting a mistrial after a witness testified on evidence excluded earlier by an in limine ruling; (5) whether the district court erred in refusing to limit the testimony of an expert witness; (6) whether the failure to plead mitigation as an affirmative defense precludes a jury instruction on that defense; and (7) whether the district court abused its discretion in denying Kirby's Federal Rule of Civil Procedure 60(b) motion. Frederick presents two issues on cross-appeal: (1) whether the district court erred in directing a verdict

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* Honorable Lenore C. Nesbitt, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

against his claim for penalty wages under 46 U.S.C. § 10504; and (2) whether the district court erred in applying the collective bargaining agreement's maintenance rate, instead of Frederick's actual maintenance expenditures. After a thorough review of the record, we conclude that the jury's damages award for unearned wages, maintenance, and cure is not supported by the evidence. Therefore, we reverse that part of the judgment and remand this case to the district court with instructions to either remit the jury's damages award to $107,946.43 or grant Frederick a new trial on damages. We affirm the district court's judgment on all other issues.

I. Background

Kirby owns and operates oil tankers, including the Champion. Kirby hired Frederick, a career ship engineer, to work on the Champion as its chief engineer. Frederick worked on the Champion as it delivered oil from Pascagoula, Mississippi, to various U.S. ports on the Atlantic Ocean.

On September 12, 1994, while aboard the Champion, Frederick slipped and fell on an allegedly oily ramp. As a result, he suffered severe pain in his left knee, hips, and back. He laid on the deck until another crewmember found him and assisted him to his room. The ship's captain, Captain Fox, visited Frederick and entered a notation into the ship's log that Frederick suffered injuries to his "left leg, knee to hip." The ship arrived in port on September 13, and Frederick went to a medical facility where he received a "not fit for duty" slip. He returned to the ship for the night and left the ship the next day.

Subsequently, he traveled to his mother's house and stayed with his fatally-ill mother until she died on October 30, 1994.

While at his mother's house, Frederick sought treatment for his injuries. Dr. Sicari treated Frederick's knee and recommended that he seek further treatment from Dr. Hottentot, an orthopedic surgeon. Dr. Hottentot examined Frederick's knee and concluded that his knee had recovered. Dr. Hottentot, however, discovered that Frederick, for the last 10 to 15 years, had suffered from a degenerative hip condition. As a result, Dr. Hottentot advised Frederick to undergo a bilateral hip replacement and advised Frederick that he should not return to work.

Even though Frederick's hip problems persisted, he returned to work on the Champion in January of 1995 because he needed money. His hips caused him constant pain, but he could not take pain medication onboard the ship because Kirby had a policy against drug use by its employees. Due to the constant pain, Frederick cut short his tour of duty. A few months later, Kirby terminated Frederick, alleging that he falsified oil records. After his termination, Frederick consulted an orthopaedic surgeon, Dr. Choung, who eventually performed right hip replacement surgery on Frederick.

On May 23, 1996, Frederick filed a complaint against Kirby, asserting claims of Jones Act negligence, unseaworthiness, maintenance, and cure for injuries to his left knee, both hips, and back that he suffered in the slip and fall. He also sought lost wages and penalty wages pursuant to 46 U.S.C. § 10504. After a series of in limine rulings, the district court conducted a jury trial.

After the conclusion of the trial, the jury returned a verdict in favor of Frederick in the amount of $810,903.80. This award included $525,069.00 for unearned wages, maintenance, and cure, and $1,242,760.00 for Jones Act negligence and unseaworthiness, adjusted downward by 77% due to Frederick's pre-existing hip condition. The district court denied Kirby's renewed motion for judgment as a matter of law, or alternatively, motion for a new trial or remittitur. Kirby then appealed to this court.

On August 6, 1998, Frederick filed a second complaint against Kirby seeking additional maintenance and cure payments. This second action, Case No. 98-1559, Civ. T-23 C (*"Frederick II"*), has been stayed pending resolution of this appeal. On August 21, 1998, Frederick filed another complaint, Case No. 98-207, Civ. OC-10B (*"Frederick III"*), alleging disability discrimination under the American with Disabilities Act ("ADA") and age discrimination under the Age Discrimination in Employment Act ("ADEA").

Soon after the filing of *Frederick II* and *III*, Kirby filed a Federal Rule of Civil Procedure 60(b) motion for relief from judgment, alleging that the two subsequent actions contradicted allegations presented by Frederick in *Frederick I*. The district court denied Kirby's Rule 60(b) motion, and Kirby appealed the district court's ruling to this court. We have consolidated the appeals.

II. Discussion

A. Appeals by Kirby

1. Excessiveness of the Maintenance, Cure, and Unearned Wages Damages Award

Kirby contends on appeal that the district court erred in not granting its motion for remittitur, or alternatively, a new trial on damages only, due to the jury's allegedly excessive award for maintenance, cure, and unearned wages. In particular, Kirby avers that the evidence presented at trial supported a maximum award for maintenance, cure, and unearned wages of only $107,947.43, a figure well below the jury's award of $525,069, especially considering that the jury did not award extra damages caused by a willful and arbitrary refusal to pay maintenance and cure.

In an appeal from a denial of a motion for remittitur, this court "must independently determine the maximum possible award that is reasonably supported by the evidence in the record." *Deakle v. John E. Graham & Sons*, 756 F.2d 821, 827 (11th Cir.1985). Any excess must be remitted, or alternatively, a new trial may be granted on damages. *See id.* at 827-28.

We conclude that the record supports $107,947.43 as the maximum possible amount for maintenance, cure, and unearned wages. Frederick's economist, Dr. Susan Long, who relied upon a daily maintenance rate of $15 per day, calculated the maximum past and future maintenance that Kirby owed Frederick to be $20,910.73. Dr.

Long also testified that Frederick's past and future medical expenses, i.e. cure, total $75,000, absent any complications. Frederick did not produce any evidence of complications. As to unearned wages, Frederick is entitled to wages from the time of his discharge until his employment term expired. The collective bargaining agreement set his daily wage at $326.24, which, when adjusted at the 21.5 percent tax rate utilized by Dr. Long, amounts to $256.10 per day. Frederick should receive unearned wages for the time between September 14, 1994, the date he disembarked the Champion, and October 30, 1994, the date his mother died, because Frederick testified that he would have disembarked upon her death regardless of his health. For those 47 days, Frederick's unearned wages total $12,036.70. By adding together $20,910.73 for maintenance, $75,000 for cure, and $12,036.70 for unearned wages, we conclude that the maximum possible amount for maintenance, cure, and unearned wages is $107,947.43.

Furthermore, the jury did not award extra damages caused by a willful and arbitrary refusal to pay maintenance and cure. Pursuant to jury instruction number 13, the jury could award damages to Frederick based on a finding of a willful or arbitrary failure by Kirby to pay maintenance and cure.[1] The jury, however, held that

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[1] Jury instruction 13 states:

> However, you [the jury] may still be able to award damages to the Plaintiff for any "willful or arbitrary" failure on the part of the employer to have paid him maintenance and cure when it was due.

Kirby was not willful and arbitrary in its failure to pay maintenance and cure.[2] Thus, the jury's award of $525,069 exceeds the maximum amount of damages supported by the evidence.

Now, we must determine whether to order a remittitur or a new trial. The rule in this circuit states that where a jury's determination of liability was not the product of undue passion or prejudice, we can order a remittitur to the maximum award the evidence can support. *See Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1507 (11th Cir.1985); *Howell v. Marmpegaso Compania Naviera*, 536 F.2d 1032, 1034 (5th Cir.1976).[3] Because the jury refused to find Kirby willful and arbitrary in providing maintenance and cure and found that the accident slightly aggravated a pre-existing injury, we reject Kirby's contention that the jury was actuated by passion. *See Howell*, 536 F.2d at 1034 n. 4 (holding that a jury was not

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> Where the Defendant willfully and arbitrarily fails to pay maintenance or provide cure to a seaman up to the time that he receives maximum cure, and such failure results in an aggravation of the seaman's injury, then the seaman may recover those damages and necessary expenses that he can prove he sustained.

[2] Special jury verdict number nine asked the jury: "If you answered 'Yes' to Question 7 [whether Kirby failed to pay maintenance and cure], was Kirby willful and arbitrary in their failure to pay maintenance and cure." The jury answered "No."

[3] This court adopted as binding precedent all Fifth Circuit decisions prior to October 1, 1981. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc).

actuated by passion where it refused to find the defendant shipowner negligent and found the plaintiff contributorily negligent). In sum, we hold that the evidence presented in this case reasonably supports a maximum award of $107,947.43 for maintenance, cure, and unearned wages. On remand, we direct the district court to order a remittitur in this amount, or at Frederick's option, grant him a new trial on the issue of damages. *See Deakle*, 756 F.2d at 834.

2. Judgment as a Matter of Law on Maintenance and Cure

Kirby argues that the district court erred in rejecting its motion for judgment as a matter of law on Frederick's maintenance and cure claim. Kirby asserts that Frederick did not produce sufficient evidence to prove that his fall aggravated his pre-existing degenerative hip condition. In deciding a motion for judgment as a matter of law, this court determines whether substantial evidence of such quality and weight exists that reasonable and fair-minded jurors in the exercise of impartial judgment might reach a different conclusion. *See Vulcan Painters, Inc. v. MCI Constructors Inc.*, 41 F.3d 1457, 1461 (11th Cir.1995). In examining the evidence, we view the evidence in the light most favorable to the nonmovant. *See Equitable Life Assur. Soc'y of the United States v. Studenic*, 77 F.3d 412, 415 (11th Cir.1996).

Frederick presented sufficient evidence to prove that the fall aggravated his hip condition. On the day of the fall, Captain Fox reported that Frederick suffered injuries to the "leg, knee to hip." At trial, Dr. Hottentot, an

orthopedic surgeon, testified that the fall probably wrenched Frederick's hips and that the fall accelerated the deterioration of his hips. Similarly, Dr. Choung, Frederick's treating physician, testified that the fall probably accelerated the deterioration of Frederick's hips. Dr. Choung also testified that Frederick used his knees and back to compensate for his hip condition and that he could have continued to work if not for the fall. Frederick, however, could not recover from the fall as well as someone without a pre-existing hip condition.

We conclude that this evidence, viewed in the light most favorable to Frederick, is of such quality and weight that reasonable and fair-minded jurors in the exercise of impartial judgment could conclude that Frederick's fall aggravated his pre-existing hip condition. *See Landry v. Offshore Logistics, Inc.*, 544 F.2d 757, 760 (5th Cir.1977) ("Here, we have the classic conflict. One doctor says that Landry has only a 5% disability and can go back to work. Another doctor, and Landry, say that he cannot. We must resist the temptation to say what we would have done had we been sitting on the jury, for the issue was for it to determine."). Therefore, we affirm the district court's denial of Kirby's motion for judgment as a matter of law as to the maintenance and cure claim.

3. Evidence of Frederick's Termination by Kirby

Kirby asserts that the district court erred in not giving a limiting instruction on evidence regarding Frederick's termination as required by Federal Rules of

Evidence 105 ("Rule 105").[4] Kirby argues that the jury could consider the termination evidence for proof of Frederick's motive to sue, but not for the propriety of the termination. The district court agreed, stating that the jury could consider the evidence only in regards to Frederick's motive to sue, but did not give a limiting instruction as requested by Kirby. Under Rule 105, a court must give a limiting instruction when requested where evidence is admissible for one purpose and not another. *See Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc.*, 630 F.2d 250, 266 (5th Cir.1980).

We conclude that the district court erred in not granting Kirby's request for a limiting instruction, but the failure to do so was harmless error because Kirby cannot show that the district court's failure to give a limiting instruction affected its substantial rights. *See* Fed.R.Evid. 103(a); Fed.R.Civ.P. 61; *Lubbock*, 630 F.2d at 266. Kirby alleges that Frederick used the termination's propriety to create sympathy and prejudice in the jury, but Kirby does not elaborate beyond this assertion. Therefore, we hold that Kirby has failed to satisfy its burden of demonstrating that it was prejudiced by the district court's failure to give a limiting instruction. *See Hunt v. Marchetti*, 824 F.2d 916, 920 (11th Cir.1987) (holding that a party asserting an

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[4] Fed.R.Evid.105 provides:

"When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."

error on appeal has the burden of demonstrating prejudice to substantial rights); *Perry v. State Farm Fire & Casualty Co.*, 734 F.2d 1441, 1446 (11th Cir.1984) (same).

4. Motion for Mistrial

Kirby argues that the district court abused its discretion by not ordering a mistrial after a witness on a videotape alleged that Kirby's employees had intentionally spilled oil onto the Champion's deck. Prior to trial, the district court, pursuant to Kirby's motion in limine, excluded such evidence as prejudicial. During the trial, Frederick played the videotaped testimony without excising the testimony on the spilled oil, and thus, the jury heard the inadmissible evidence.

We review a district court's decision on a motion for mistrial for abuse of discretion. *See United States v. Newsome*, 998 F.2d 1571, 1575 (11th Cir.1993). To find error warranting reversal, we must find that Kirby made a timely objection and that a substantial right was affected. *See* Fed.R.Evid. 103(d); *Judd v. Rodman*, 105 F.3d 1339, 1342 (11th Cir.1997). We conclude, as did the district court, that Kirby did not make a timely objection because it did not object until after the videotape testimony was played.[5]

Alternatively, Kirby argues that its motion in limine preserved its right to appeal this issue. Generally, a party

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[5] The district court also noted that Kirby did an excellent job of impeaching the witness and thus reduced the prejudicial effect caused by the introduction of evidence that Kirby had intentionally spilled oil.

must object to preserve error in the admission of testimony, even when a party or a court violates an in limine ruling. *See Collins v. Wayne Corp.*, 621 F.2d 777, 785 (5th Cir.1980). A motion in limine, however, may preserve an error for appeal if a good reason exists not to make a timely objection at trial. *See Judd*, 105 F.3d at 1342.

Kirby presents two reasons for not objecting immediately. First, Kirby argues that it elicited most of the allegedly prejudicial testimony on cross-examination, and if Kirby objected to its own cross-examination, then it would have drawn the jury's attention to the prejudicial evidence. *See Rojas v. Richardson*, 703 F.2d 186, 189 (5th Cir.1983) ("An objection to one's own testimony is an absurdity. . . . This Circuit consequently found the offensive use of damaging information to fall outside the general rule requiring a timely objection."). Kirby, however, could have objected when the evidence was offered on direct examination, thereby avoiding the potential problem of objecting to its own cross-examination. Second, Kirby asserts that it did not anticipate that Frederick would play the non-excised videotaped testimony and was caught off guard. This is not a valid reason for failing to make a timely objection. Therefore, we conclude that Kirby has not presented a valid reason for its late objection and has not preserved its right to appeal this issue.

5. Expert Testimony on Frederick's Future Work Life

Kirby argues that the district court abused its discretion by allowing Dr. Choung to testify regarding Frederick's future work life expectancy. Prior to trial, the

court denied Kirby's motion in limine to limit Dr. Choung's testimony. At trial, Kirby failed to object to Dr. Choung's testimony regarding Frederick's future work life expectancy. Kirby does not present any reasons for not objecting to the testimony at trial. Thus, Kirby has waived its right to appeal this issue. *See Judd*, 105 F.3d at 1342; *Collins*, 621 F.2d at 785.

6. Jury Instruction on Failure to Mitigate Damages

Kirby alleges that the district court committed error by denying its requested instruction on mitigation of damages. In particular, Kirby argues that the court erred in holding that the failure to mitigate damages is an affirmative defense.

Federal Rule of Civil Procedure 8(c) ("Rule 8(c)") does not include the failure to mitigate damages among the 19 enumerated affirmative defenses. Most federal courts, however, regard the failure to mitigate as an affirmative defense under Rule 8(c)'s catchall clause which provides for "any other matter constituting an avoidance or affirmative defense." *See Conjugal Partnership v. Conjugal Partnership*, 22 F.3d 391, 400 (1st Cir.1994) ("Failure to mitigate is an affirmative defense as a matter of federal procedural law. . . . "); *Lennon v. United States Theatre Corp.*, 920 F.2d 996, 1000 (D.C.Cir.1990) ("[F]ailure to mitigate damages is an affirmative defense under Rule 8(c)."); *Sayre v. Musicland Group, Inc.*, 850 F.2d 350, 354 (8th Cir.1988) (same). This circuit has held that the "failure to mitigate damages . . . is an affirmative defense." *NLRB v.*

Pilot Freight Carriers, Inc., 604 F.2d 375, 376 (5th Cir.1979). Kirby has cited no case to the contrary.

Instead, Kirby asserts two arguments as to why the failure to mitigate damages is not an affirmative defense. First, Kirby, citing to a 1917 case, argues that under admiralty law the failure to mitigate is not an affirmative defense. *See Coronet Phosphate Co. v. United States Shipping Co.*, 260 F. 846, 848 (S.D.N.Y.1917) ("[T]here is no propriety, even in admiralty, in pleading evidence in mitigation of damages in the answer to the libel."). This 1917 case, however, predates a change in law which applies the Federal Rules of Civil Procedure to admiralty cases. Since the change in 1966, federal courts have viewed the mitigation of damages as an affirmative defense in admiralty cases. *See Boudreau v. S/V Shere Khan C*, 27 F.Supp.2d 72, 81 (D.Me.1998) (citing *Fashauer v. New Jersey Transit R. Operations, Inc.*, 57 F.3d 1269, 1289 (3rd Cir.1995)) ("The plaintiff has a duty to take reasonable steps to minimize his or her losses, and the defendant bears the burden of proving breach of such a duty as an affirmative defense."); *see also Davis v. Odeco, Inc.*, 18 F.3d 1237, 1246 (5th Cir.1994) (holding in a maritime case that the defense of set-off against maintenance and cure is an affirmative defense).

Second, Kirby argues that only defenses which relieve liability must be affirmatively pled and not defenses that diminish damages. Kirby cites *Southport Transit Co. v. Avondale Marine Ways, Inc.*, 234 F.2d 947 (5th Cir.1956), for the proposition that the failure to mitigate damages is not a defense, but a mere rule of damages. *See id.* at 952. The Southport court did not address whether the failure to mitigate is an affirmative defense, rather it

merely explained the difference between contributory negligence and the failure to mitigate. In *Sayre v. Musicland Group, Inc.*, the Eighth Circuit rejected as unsound the exact same assertion that only defenses that bar recovery, rather than those that diminish the amount of damages, must be pled affirmatively. *See* 850 F.2d at 354. Like our sister circuit, we reject Kirby's arguments and hold that failure to mitigate damages is an affirmative defense under Rule 8(c). Accordingly, the district court did not err in rejecting Kirby's jury instruction because failure to plead an affirmative defense results in waiver of that defense. *See American Nat'l Bank v. FDIC*, 710 F.2d 1528, 1537 (11th Cir.1983).

7. Rule 60(b)

Kirby asserts that the district court abused its discretion by not granting Kirby's Federal Rule of Civil Procedure 60(b) ("Rule 60(b)") motion for relief from judgment. Specifically, Kirby argues that the district court erred by concluding that the subsequent lawsuits filed by Frederick do not amount to a basis for Rule 60(b)(3) relief and by failing to address Kirby's Rule 60(b)(5) and (b)(6) claims. We review the district court's denial of a motion to set aside a judgment pursuant to Rule 60(b) for abuse of discretion. *See American Bankers Ins. Co. v. Northwestern Nat'l Ins. Co.*, 198 F.3d 1332, 1338 (11th Cir.1999). After reviewing the record, we reject Kirby's arguments and affirm the district court's ruling.

a. Rule 60(b)(3)

Rule 60(b)(3) allows a court to grant relief from a final judgment if the moving party proves by clear and convincing evidence that an adverse party has obtained the verdict through fraud, misrepresentation, or other misconduct. *See Scutieri v. Paige*, 808 F.2d 785, 794 (11th Cir.1987); *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1339 (5th Cir.1978). The moving party must also show that the conduct prevented the losing party from fully and fairly presenting his case or defense. *See Scutieri*, 808 F.2d at 794; *Rozier*, 573 F.2d at 1339.

Kirby alleges two instances of fraud and misrepresentation committed by Frederick when he allegedly took a particular position in *Frederick I* and then took an inconsistent position in *Frederick II* and *III*.[6] Kirby argues that Frederick committed fraud and misrepresentation by presenting evidence in *Frederick I* on the monetary amounts for both past and future maintenance and cure, and then, subsequently suing for additional maintenance and cure in *Frederick II*. Kirby, however, does not point to any factual allegation made in *Frederick II* that directly contradicts *Frederick I*. Instead, Kirby only avers that Frederick

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[6] In conjunction with its argument, Kirby asserts that the district court erred by considering the pleadings in *Frederick II* and *III* as allegations and not as admissible evidence. Generally, "the pleading[s] of a party made in another action . . . are admissible as admissions of the pleading party to the facts alleged therein." *Continental Ins. Co. of New York v. Sherman*, 439 F.2d 1294, 1298 (5th Cir.1971). We are persuaded that the district court considered the pleadings as admissible evidence, and accordingly, found that the pleadings did not prove fraud, misrepresentation, or misconduct by Frederick.

committed fraud and misrepresentation by suing a second time for maintenance and cure. If Frederick did attempt to take a second bite from the proverbial apple as Kirby argues, then the appropriate action for Kirby is to obtain dismissal of *Frederick II* on the basis of claim or issue preclusion, and possibly, seek Rule 11 sanctions. However, a Rule 60(b) motion is not appropriate.

Kirby also argues that, in *Frederick I*, Frederick stated he was unable to work, but filed in *Frederick III* an age and disability discrimination case under the ADA and ADEA. The ADA defines a "qualified" individual as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions" of his job. 42 U.S.C. § 12111(8); *see also Talavera v. School Bd. of Palm Beach County*, 129 F.3d 1214, 1220 (11th Cir.1997) (holding that an employee's certification of total disability for social security disability does not always judicially estop an employee from arguing that she is a qualified individual with a disability under the ADA). Consistent with ADA requirements, Frederick asserts in *Frederick III* that he can work with accommodation after his left hip is replaced. Thus, Frederick's assertion in *Frederick III* that he could work with accommodation after his hip is replaced is not inconsistent with his claimed inability to work in *Frederick I*. Accordingly, we reject Kirby's arguments and affirm the district court's Rule 60(b)(3) ruling.

b. Rule 60(b)(5) and Rule 60(b)(6)

Kirby also argues that the district court erred by not addressing its Rule 60(b)(5) and (b)(6) arguments. Rule

60(b)(5) allows a court to provide relief from judgment where "it is no longer equitable that the judgment should have prospective application." Kirby argues that the alleged inconsistencies arising from *Frederick II* and *III* make enforcement of the jury's verdict in *Frederick I* no longer equitable. In fact, the district court did address this argument and found that Kirby presented no evidence that cast doubt on the integrity of *Frederick I*. We conclude that the district court correctly rejected Kirby's Rule 60(b)(5) argument.

Rule 60(b)(6) allows a court to provide relief from judgment for "any other reason justifying relief from the operation of the judgment." Federal courts grant relief under Rule 60(b)(6) only for extraordinary circumstances. *See High v. Zant*, 916 F.2d 1507, 1509 (11th Cir.1990). Kirby contends that it deserves relief because Frederick's counsel, during closing arguments in *Frederick I*, stated that this case was Frederick's last and only chance to receive compensation for his injuries. We agree with the district court that this comment may have been inappropriate, but that it is not sufficient to grant Rule 60(b)(6) relief. Kirby raises two additional arguments for Rule 60(b)(6) relief, both of which are meritless and are more appropriately raised in *Frederick II* and *III* as arguments for claim or issue preclusion. Thus, we affirm the district court's denial of Kirby's Rule 60(b) motion.

B. Cross-Appeals by Frederick

1. Penalty Wages Claim

Frederick argues on appeal that the district court incorrectly interpreted 46 U.S.C. § 10504 when it concluded that he was not entitled to collect penalty wages. This court reviews a district court's statutory interpretation de novo. *See United States v. Pemco Aeroplex, Inc.*, 195 F.3d 1234, 1236 (11th Cir.1999) (en banc). In addressing Frederick's contention, we must first determine the type of voyage the Champion undertook. Only after that determination can we examine the appropriate penalty wage statute to determine Frederick's rights and whether an exception to the penalty wage statute excludes Frederick's claim.

First, Frederick argues that the district court incorrectly held that the Champion was on a coastwise voyage. Instead, Frederick avers that the Champion was on a coasting voyage. Frederick's attempted distinction between a coasting voyage and a coastwise voyage is irrelevant. The prior penalty wage statute, 46 U.S.C. § 596, provided for a right to collect penalty wages in coasting voyages, but section 544 specifically excluded seamen on coastwise voyages from collecting penalty wages. The current statute, however, does not distinguish between coasting and coastwise voyages. Instead, the current statute, which does not mention coasting voyages, establishes three designations for voyages: foreign, intercoastal, and coastwise.

Under the current statutory scheme, the Champion was on a coastwise voyage. The statute defines a coastwise voyage as "a voyage between a port in one State and

a port in another State (except an adjoining State)" and excludes from the definition voyages between a U.S. port on the Atlantic Ocean and a U.S. port on the Pacific Ocean. *See* 46 U.S.C. §§ 10301(a), 10501(a). The Champion traveled from Mississippi to Connecticut – a coastwise voyage.

Section 10504 provides a right to penalty wages for seamen on a coastwise voyage. The penalty wage provision states that a master must pay a seaman the balance of wages due within two days of termination, otherwise the master must pay the seaman two days' wages for each day payment is delayed. *See* 46 U.S.C. § 10504(b) & (c). This section, however, excludes seamen on "a vessel engaged in coastwise commerce" from this penalty wage provision.[7] *See* 46 U.S.C. § 10504(d)(1).

Section 10504 does not provide a separate definition for "coastwise commerce," but section 10501 provides a clear definition of "coastwise." As previously stated, the

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[7] Title 46 U.S.C. § 10504 in pertinent part states:

(b) The master shall pay a seaman the balance of wages due the seaman within 2 days after the termination of the agreement required by section 10502 of this title or when the seaman is discharged, whichever is earlier.

(c) When payment is not made as provided under subsection (b) of this section without sufficient cause, the master or owner shall pay the seaman 2 days' wages for each day payment is delayed.

(d) Subsections (b) and (c) of this section do not apply to:

(1) a vessel engaged in coastwise commerce.

Champion falls under section 10501's definition of "coastwise." Now, we need only determine whether the Champion engaged in commerce. At a minimum, commerce includes the transportation of goods between states. *See Black's Law Dictionary* 263 (7th ed.1999) (defining "commerce" as "the exchange of goods and services, especially on a large scale involving transportation between cities, states and nations") (emphasis added). The Champion engaged in commerce because it transported heating oil between Mississippi and Connecticut. Thus, the district court correctly held that the Champion engaged in coastwise commerce.[8]

We recognize that the exclusion of "a vessel engaged in coastwise commerce" from the right to recover penalty wages effectively eliminates the benefit of the penalty

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[8] Frederick cites *Solvang v. M/T PLAN KRISTINE*, 1994 A.M.C. 1133, 1993 WL 666703 (S.D.Tex.1993), for the proposition that the coastwise commerce exception does not include a trip from a U.S. port on the Gulf Coast to a U.S. port on the Atlantic coast. *See id.* at 1138. The Solvang court explained that the coastwise commerce exception differs from a coastwise voyage in that the exception only excludes vessels that work on sheltered bodies of water. *See id.* As a result, the coastwise exception did not apply because the "Gulf of Mexico is not a sheltered body of water such as a harbor or coastal waterway and is not within the coastwise commerce exception." *See id.* (citing *Carson v. Gulf Oil Corp.*, 123 So.2d 35, 39 (Fla.App.Ct.1960)). Section 10501, however, does not refer to sheltered bodies of water or harbors in its definition of coastwise. Instead, Congress clearly intended the coastwise commerce exception to cover coastwise voyages engaged in commerce. Thus, we conclude that these cases are unpersuasive.

wage provision for coastwise voyages.[9] *See Dunham v. M/V Marine Chemist*, 812 F.2d 212, 215 (5th Cir.1987) (holding that a claim for penalty wages, pursuant to section 10504, no longer applies to coastwise voyages). The legislative history surrounding this chapter sheds light on this contradiction.

Congress re-codified the shipping laws in 1983 in order to clarify and reorganize a confusing collection of individual statutes enacted over a period of two centuries. *See* H. Rep. No. 98-338, at 113 (1983), reprinted in 1983 U.S.C.C.A.N. 924, 924. As part of this reorganization, Congress placed the laws regarding foreign and intercoastal voyages into a different chapter than coastwise voyages. In particular, Congress placed a penalty wage provision in both 46 U.S.C. § 10313, which applies to foreign and intercoastal voyages, and 46 U.S.C. § 10504, which applies to coastwise voyages. After the reorganization, Congress noticed that the new penalty wage provisions did not include the coastwise exception found in the prior law.[10] To rectify this error, Congress amended 46

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[9] We note that there may be instances in which a vessel is on a coastwise voyage, but not engaged in commerce, and accordingly, not engaged in coastwise commerce. However, we believe that such a situation would arise rarely, if at all, and perhaps this is a distinction without a difference. Moreover, we do not have to decide that issue in this case because we hold that the Champion engaged in commerce.

[10] The prior statute, 46 U.S.C. § 596, provided in pertinent part: The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or

U.S.C. § 10504(d)(1) to exclude vessels engaged in coastwise commerce, and in the amendment's legislative history, expressly explained its rationale for amending the statute by stating that:

> Title 46 U.S.C. § 544 provided that "[n]one of the provisions in sections . . . 591-596 . . . of this title shall apply to sail or steam vessels engaged in the coastwise trade, except the coastwise trade between the Atlantic and Pacific coasts. . . . "
>
> Coastwise commerce encompasses voyages of vessels from one place in the United States to another, including voyages on the Great Lakes, but not voyages from the Atlantic Coast to the Pacific Coast. . . . Under prior law (former 46 U.S.C. 544), vessels engaged in coastwise commerce were exempt from this requirement. However, in the codification of the shipping laws in title 46, . . . this exemption was inadvertently omitted. . . . This section [10504(d)(1)] would simply restore the coastwise . . . commerce exemption so that the affected vessels will not have to disrupt the pay and accounting systems already in place just because of an oversight in the codification of title 46, United States Code.

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from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged. . . . Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods.

S.Rep. No. 99-26, at 4 (1985), reprinted in 1985 U.S.C.C.A.N. 25, 28. Thus, Congress intended this odd statutory structure.

In sum, we hold that "a vessel engaged in coastwise commerce" is a vessel engaged in commerce that travels between a U.S. port in one State and a U.S. port in another non-adjacent State, except a vessel that travels between a U.S. port on the Atlantic Coast and a U.S. port on the Pacific Coast. We also hold that the Champion was on a coastwise voyage and engaged in coastwise commerce. As a result, we affirm the district court's holding that Frederick could not collect under the penalty wage statute.

2. Applicable Daily Maintenance Rate

Frederick contends that the district court erred in holding that the collective bargaining agreement ("CBA") rate of $15 per day for maintenance applies even though he spent substantially more for maintenance. This circuit has not addressed this issue, and the other federal circuit courts that have are divided.

The duty to pay maintenance is imposed by "general maritime law." *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 370-71, 53 S.Ct. 173, 77 L.Ed. 368 (1932). The right of maintenance consists of the right to payments sufficient to provide a seaman with food and lodging comparable to the kind received aboard ship. *See Calmar Steamship Corp. v. Taylor*, 303 U.S. 525, 528, 58 S.Ct. 651, 82 L.Ed. 993 (1938). This duty attaches once the seaman

enters the service of a ship. *See De Zon v. American President Lines*, 318 U.S. 660, 667, 63 S.Ct. 814, 87 L.Ed. 1065 (1943). No private agreement is competent to abrogate the shipowner's duty to pay maintenance.[11] *See id.*

Relying heavily on the principle stated in De Zon, the Third Circuit's minority position holds that a CBA maintenance rate does not bind a seaman, if the seaman can prove higher daily expenses. *See Barnes v. Andover Co.*, L.P., 900 F.2d 630, 640 (3rd Cir.1990) ("[A] union cannot bargain away the individual seaman's common law right to maintenance by agreeing to a wholly inadequate figure as a daily maintenance rate."). The Barnes court noted that a CBA could set the maintenance level so low as to abrogate a seaman's right to maintenance and thus violate De Zon. *See id.* at 637. Furthermore, the court held that neither the federal labor laws nor their underlying

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[11] The Supreme Court, in Calmar, summarized the policy rationale underlying this duty:

> The reasons underlying the rule, to which reference must be made in defining it, are those enumerated in the classic passage by Mr. Justice Story in *Harden v. Gordon*, C.C., Fed.Cas.No. 6047: The protection of seamen, who, as a class, are poor, friendless and improvident, from the hazards of illness and abandonment while ill in foreign ports; the inducement to masters and owners to protect the safety and health of seamen while in service; the maintenance of a merchant marine for the commercial service and maritime defense of the nation by inducing men to accept employment in an arduous and perilous service. 303 U.S. at 528, 58 S.Ct. 651.

policies preempted the common law right to maintenance. *See id.* at 639-40. The Third Circuit therefore concluded that the traditional doctrine allowing for maintenance could require a court to ignore the terms of a CBA. *See id.* at 640.

We conclude that the Third Circuit's minority position is unpersuasive, and instead, join the majority of circuit courts in holding that where a CBA fixes a maintenance rate, the court should accept it as reasonable. *See Baldassaro v. United States*, 64 F.3d 206, 212 (5th Cir.1995) (enforcing rate of $8 set in CBA); *Al-Zawkari v. American S.S. Co.*, 871 F.2d 585, 588 (6th Cir.1989) (same); *Macedo v. F/V Paul & Michelle*, 868 F.2d 519, 522 (1st Cir.1989) (enforcing rate of $10 set in CBA); *Gardiner v. Sea-Land Serv., Inc.*, 786 F.2d 943, 948 (9th Cir.1986) (enforcing rate of $8 set in CBA). The majority position agrees with the minority in that labor law does not preempt the common law maritime right of maintenance. *See Gardiner*, 786 F.2d at 948. The majority, however, differs in holding that the changed circumstances of unionized seamen undercut the rationale supporting the traditional right to maintenance and cure. *See Macedo*, 868 F.2d at 522 (citing *Gardiner*, 786 F.2d 943).

Moreover, the broad labor policies which undergird federal labor law, as well as the nature of the collective bargaining process, require adherence to the CBA. *See Gardiner*, 786 F.2d at 948-49. "Congress viewed collective bargaining as a key instrument in its effort to promote industrial peace. . . . [T]his court will not lightly embrace the repudiation of contractual obligations enumerated in a collective bargaining agreement and will choose the

rule that will promote the enforcement of collective bargaining agreements." *Baldassaro*, 64 F.3d at 212-13 (quoting *Gardiner*, 786 F.2d at 948) (citations omitted). Although the right to maintenance is a common law right, its rate may be subject to the negotiation process. *See Gardiner*, 786 F.2d at 948. In considering the negotiation process, we note that, as in *Baldassaro* and *Gardiner*, *Frederick* makes no allegations that the CBA as a whole is unfair or that the union did not adequately represent him. During the negotiation process, the right of maintenance is but one of many issues over which the parties negotiate. *See id.* As a result, a court should not examine the adequacy of the maintenance rate in isolation "because the determination of its adequacy in relation to the whole scheme of benefits has already been made by the union and the seamen who voted for the contract." *Baldassaro*, 64 F.3d at 213 (quoting *Gardiner*, 786 F.2d at 949) (citations omitted).

Frederick also argues that this court should create an exception to the majority position because Kirby acted inequitably by failing to pay weekly maintenance to him as required by the CBA. Instead, five months after the injury, Kirby paid Frederick a lump-sum. Kirby counters by asserting that it had trouble locating Frederick, who was at his sick mother's home, and that once Kirby found him, Frederick informed Kirby that he would advise Kirby at a later date as to the proper time and location to send the money. Thus, Kirby contends that it acted equitably and made a good faith effort to satisfy the CBA. The jury agreed with Kirby and held that Kirby did not willfully and arbitrarily fail to pay maintenance and cure to Frederick. We need not decide whether to create an

exception to the majority position because we conclude that Kirby acted equitably. Consequently, we hold that where a CBA fixes a maintenance rate, the CBA rate applies even if the seaman spent substantially more for maintenance. Thus, we affirm the district court's decision to apply the CBA's daily maintenance rate of $15.

III. Conclusion

The jury's award of damages for unearned wages, maintenance, and cure in the amount of $525,069 exceeds the maximum amount supported by the evidence. The evidence supports a maximum award of $107,947.43 only. As a result, we reverse that part of the district court's judgment entered on the jury's verdict and remand this case to the district court with instructions to order a remittitur reducing the award of damages to $107,947.43, or, at Frederick's option, grant a new trial on the question of damages. We affirm the judgment as to all remaining issues.

AFFIRMED in part, REVERSED in part, AND REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

TERRANCE J. FREDERICK,

Plaintiff,

v.

KIRBY TANKSHIPS, INC.,

Defendant.
_____/

CASE NO:
96-1022-CIV-T-26A

ORDER

Before the Court is the Defendant's Renewed Motion for Judgment as a Matter of Law, or alternatively, Motion for a New Trial or remittitur (DKT. 166). After carefully considering the motion together with the Plaintiff's Response (DKT. 169) and the Court's recollection of the evidence and testimony, the Court is of the opinion that (1) there was sufficient evidence upon which the jury in this case could have reasonably determined that the Plaintiff's fall aboard the Defendant's vessel aggravated the Plaintiff's preexisting degenerative hip condition and caused the need for him to undergo hip replacement surgery and (2) the size of the jury's verdict is not against the manifest weight of the evidence, was not influenced by passion or prejudice, and does not shock the conscience of this Court. It is the Court's further opinion that, contrary to the Defendant's contentions, the jury diligently followed the instructions of the court (most of

which were proposed by the Defendant) and, after extensive deliberations, arrived at a just and fair verdict as to damages based on the evidence presented.

ACCORDINGLY, it is **ORDERED AND ADJUDGED** as follows:

1) Defendant's Renewed Motion for Judgment as Matter of Law, or alternatively, Motion for New Trial or Remittitur (Dkt. 166) is denied.

2) Defendant's Request for Oral Argument (Dkt. 167) is denied.

DONE AND ORDERED at Tampa Florida, on April 29, 1998.

RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

COPIES FURNISHED TO:

Counsel of Record

APPENDIX C

JURY INSTRUCTION NO. 13

The Plaintiff's third claim, that, as a seaman, he is entitled to recover what the law calls "maintenance and cure." This claim is completely separate from both the Jones Act and the unseaworthiness claims of the Plaintiff, and must be decided entirely apart from your determination of those claims.

"Maintenance and cure" is the policy of providing to a seaman, who is disabled by injury or illness while in the service of the ship, medical care and treatment, the means of maintaining himself, during the period of his convalescence.

A seaman is entitled to maintenance and cure even if he is unable to establish that he was injured as a result of any negligence on the part of his employer or an unseaworthy condition existing aboard the vessel. Generally speaking, in order to recover maintenance and cure, the Plaintiff need only show that he suffered injury or illness while in the service of the vessel on which he was employed as a seaman, without willful misbehavior on his part. The injury or illness need not be work-related so long as it occurs while in the service of the ship. Neither maintenance nor cure may be reduced because of any negligence on the part of the seaman; and assumption of risk is no defense to a claim for maintenance and cure.

"Maintenance" is defined as the cost of food and lodging, and transportation to and from a medical facility. However, a seaman is not entitled to maintenance for any period of time while he is an inpatient in any hospital

because the cure provided by the employer through hospitalization includes the food and lodging of the seaman, and therefore, the maintenance obligations of the employer is also discharged. Maintenance in this case is to be paid at the rate of $15.00 per day.

The "cure" to which a seaman may be entitled includes the cost of medical attention, including the services of physicians and nurses as well as the cost of hospitalization, medicines and medical apparatus.

With regard to the period of time covered by the claim, a seaman is entitled to receive maintenance and cure from the date he leaves the vessel until he reaches the point of "maximum possible cure" under the circumstances that is, the point at which no further improvement in the seaman's medical condition is to be reasonably expected. The obligation usually ends when qualified medical opinion is to the effect that maximum possible cure has been effected.

The shipowner is not an insurer that a cure will be effected. The date when a seaman resumes his employment is one factor you may consider in deciding when the period, if any, during which a seaman may be entitled to maintenance and cure, ends. In a case in which the evidence warrants a finding that the seaman was forced by economic necessity to return to work prior to reaching maximum possible cure, that fact may be taken into account in determining the date on which maintenance and cure should terminate.

It is important to note here that if you find that the plaintiff is entitled to an award of damages under either his Jones Act or his unseaworthiness claims, and if you

include either loss of wages or medical expenses in the damage award, then maintenance and cure cannot be awarded for the same period of time. In other words, there can be no double recovery for Plaintiff. However, you may still be able to award damages to the Plaintiff for any "willful or arbitrary" failure on the part of the employer to have paid him maintenance and cure when it was due.

Where the Defendant willfully and arbitrarily fails to pay maintenance or provide cure to a seaman up to the time that he receives maximum cure, and such failure results in an aggravation of the seaman's injury, then the seaman may recover those damages and necessary expenses that he can prove he sustained. This would include damages for prolongation or aggravation of the seaman's injury, pain and suffering, and additional medical expenses incurred as a result of the failure to pay, and a reasonable sum to compensate his attorney for services furnished in obtaining maintenance and cure, for the Plaintiff.

Therefore, in order to award additional damages to the Plaintiff for a willful failure to the shipowner to provide maintenance and cure, you must find:

First: That the Plaintiff was entitled to maintenance and cure;

Second: That is was not provided.

Third: That Defendant willfully and arbitrarily failed to provide cure up to the time that the seaman reached maximum cure; and

Fourth: That such failure resulted in injury to the Plaintiff.

An Employer is not obligated to pay maintenance and cure to a seaman just because he claims an injury, and he has a right to contest the claim in good faith.

Thus, an employer acts "willfully and arbitrarily" only when he acts without reason, or with callous disregard for the claim of the seaman. An employer has a duty to investigate the claim in good faith and with reasonable diligence; so, in this regard, you may award damages for any failure to the employer to pay maintenance and cure to the Plaintiff, if, on the basis of all the facts and opportunities known to and available to the Defendant during the time in question, the refusal to pay maintenance and cure was arbitrary and capricious, or in callous disregard of the Plaintiff's claim.

It is important to remember that Plaintiff cannot recover attorney fees for the prosecution of either his Jones Act or his unseaworthiness claims, but only or (sic) the prosecution of his maintenance and cure claim, if warranted.

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

TERRANCE J. FREDERICK,

Plaintiff,

vs.

Case No: 96-1022
Civ. T-26A

KIRBY TANKSHIPS, INC.,

Defendant

_____/

SPECIAL VERDICT

(Filed March 26, 1998)

WE, the jury, return the following verdict:

1. Do you find from a preponderance of the evidence that the Defendant was negligent in the manner claimed by the Plaintiff and that such negligence was a legal cause of damage to the Plaintiff?

Answer: YES ✓ NO _____

2. Do you find from a preponderance of the evidence that the KTI CHAMPION was unseaworthy in the manner claimed by the Plaintiff and that such unseaworthiness was a legal cause of damage to the Plaintiff?

Answer: YES ✓ NO _____

[NOTE: If you answered "No" to both question 1 and question 2, skip questions 3 - 6 and move directly to question 7].

3. If you answered "Yes" to question 1 or question 2, do you find from a preponderance of the evidence that the Plaintiff himself was negligent in the manner claimed by the Defendant and that such negligence was a legal cause of Plaintiff's own damage?

Answer: YES _____ NO ✓

4. If you answered "Yes" to Question 3, what proportion or percentage of Plaintiff's damage do you find from a preponderance of the evidence to have been legally caused by the negligence of the respective parties?

Answer in terms of percentages.

The Defendant: _____%

The Plaintiff: _____%

[Note: The total of the percentage is given in your answer should equal 100 percent].

5. If you answered "Yes" to question 1 or question 2 but find that some or all of the injuries sustained by Plaintiff were aggravations of preexisting injuries, what percentage of aggravation was caused by the accident? If you determine that there was aggravation to a preexisting injury and are unable to determine the percentage of aggravation you should allocate 100% to this accident.

Answer: Was there aggravation to a preexisting condition?

YES ✓ NO _____

Percentage of aggravation caused by this accident 23 %

6. If you answered "Yes" to question 1 or question 2, what sum of money do you find from a preponderance of the evidence to be the total amount of Plaintiff's damages (without adjustment by application of any percentages you may have given in answer to questions 4 or 5)?

Answer in dollars:

$1,242,760.00

7. Do you find from a preponderance of the evidence that the Defendant has failed to pay maintenance, cure and unearned wages to the Plaintiff or on his behalf, to which Plaintiff was legally entitled?

Answer: YES ✓ NO _____

8. If you answered "Yes" to Question 7, what is the amount of maintenance, cure and unearned wages the Plaintiff is legally entitled to recover from the Defendant?

Answer in dollars.

$525,069.00

9. If you answered "Yes" to Question 7, was Kirby willful and arbitrary in their failure to pay maintenance and cure.

Answer: YES _____ NO ✓

10. Do you find from a preponderance of the evidence that the Defendant has failed to pay earned wages to the Plaintiff or on his behalf (for the day after Plaintiff was declared not fit for duty) to which Plaintiff was legally entitled?

Answer: YES ✓ NO _____

SO SAY WE ALL.

/s/ Raymond Webb 3/26/98
FOREPERSON

(2)

No. 99-1783

Supreme Court, U.S.
FILED
JUN 15 2000
CLERK

In The

Supreme Court of the United States

TERRANCE J. FREDERICK,

Petitioner,

v.

KIRBY TANKSHIPS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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23pp

QUESTIONS PRESENTED

As the body of this brief makes clear, this Court should deny Petitioner Terrance J. Frederick's petition for writ of certiorari as to all questions presented in the petition. In addition, and in accordance with Supreme Court Rule 15.2, Respondent Kirby Tankships, Inc., raises the following objections to the questions presented:

1. The first question presented in the petition does not accurately reflect the Eleventh Circuit's holding on this issue. If this Court grants the petition as to this question, Respondent submits the following as a more accurately phrased question:

> WHETHER THE ELEVENTH CIRCUIT CORRECTLY HELD THAT PETITIONER WAS NOT ENTITLED TO PENALTY WAGES UNDER 46 U.S.C. § 10504 BECAUSE THE VESSEL ON WHICH PETITIONER WAS EMPLOYED WAS ENGAGED IN COASTWISE COMMERCE.

2. Contrary to Supreme Court Rule 14.1(a), Petitioner's second question presented is argumentative and, again, does not accurately reflect the Eleventh Circuit's holding. If this Court grants the petition as to this question, Respondent submits the following as a more accurately phrased question:

> WHETHER THE ELEVENTH CIRCUIT CORRECTLY HELD THAT THE $15 MAXIMUM DAILY MAINTENANCE RATE ESTABLISHED BY THE COLLECTIVE BARGAINING AGREEMENT BETWEEN RESPONDENT AND PETITIONER'S UNION WAS ENFORCEABLE.

QUESTIONS PRESENTED – Continued

3. Petitioner's third question presented is also argumentative. Moreover, based on the arguments presented to the Eleventh Circuit, the third question presented is subsumed within the second question presented.

4. As explained in the body of this brief, Petitioner's fourth question presented was not passed on by the Eleventh Circuit.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent submits the following as a complete list of Respondent's parent corporations and publicly held companies that own 10% or more of Respondent's stock:

1. AFRAM Carriers, Inc.
2. Americas Marine Express, Inc.
3. Dixie Bulk Transport, Inc.
4. Dixie Carriers, Inc. (formerly Dixie Security Corporation)
5. Dixie Offshore Transportation Company
6. Engine Systems, Inc.
7. General Energy Corporation
8. Hollywood Marine, Inc.
9. Hollywood Acquisition Company
10. Kirby Corporation
11. Kirby Engine Systems, Inc.
12. Kirby Exploration Company of Texas
13. Kirby Inland Marine, Inc. (formerly Dixie Carriers, Inc.)
14. Kirby Inland Marine, Inc. of Louisiana (formerly Chotin Carriers, Inc.)
15. Kirby Inland Marine, Inc. of Mississippi (formerly Brent Transportation Corporation)

CORPORATE DISCLOSURE STATEMENT – Continued

16. Kirby Inland Marine, Inc. of Texas (formerly Dixie Marine, Inc.)
17. Kirby Marine Transportation Corporation
18. Kirby Pioneer, Inc.
19. Kirby Tankships, Inc.
20. Kirby Terminals, Inc.
21. Marine Systems, Inc.
22. Mariner Reinsurance Company Limited
23. Oceanic Insurance Limited
24. Rail Systems, Inc.
25. Sabine Transportation Company
26. Western Towing Company

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent, Kirby Tankships, Inc. ("Kirby"), requests that this Court deny the petition for writ of certiorari seeking review of the opinion entered by the United States Court of Appeals for the Eleventh Circuit in this case on March 8, 2000.

STATEMENT OF THE CASE

Kirby cannot accept the "Statement" submitted by Petitioner, Terrance J. Frederick ("Frederick"), because it contains many facts irrelevant to proper disposition of Frederick's petition and incorporates argument in support of Frederick's position. Kirby submits the following, taken verbatim from the Eleventh Circuit's opinion:

> Kirby owns and operates oil tankers, including the Champion. Kirby hired Frederick, a career ship engineer, to work on the Champion as its chief engineer. Frederick worked on the Champion as it delivered oil from Pascagoula, Mississippi, to various U.S. ports on the Atlantic Ocean.
>
> On September 12, 1994, while aboard the Champion, Frederick slipped and fell on an allegedly oily ramp. As a result, he suffered severe pain in his left knee, hips, and back. He laid on the deck until another crewmember found him and assisted him to his room. The ship's captain, Captain Fox, visited Frederick and entered a notation into the ship's log that Frederick suffered injuries to his "left leg, knee to hip." The

ship arrived in port on September 13, and Frederick went to a medical facility where he received a "not fit for duty" slip. He returned to the ship for the night and left the ship the next day. Subsequently, he traveled to his mother's house and stayed with his fatally-ill mother until she died on October 30, 1994.

While at his mother's house, Frederick sought treatment for his injuries. Dr. Sicari treated Frederick's knee and recommended that he seek further treatment from Dr. Hottentot, an orthopedic surgeon. Dr. Hottentot examined Frederick's knee and concluded that his knee had recovered. Dr. Hottentot, however, discovered that Frederick, for the last 10 to 15 years, had suffered from a degenerative hip condition. As a result, Dr. Hottentot advised Frederick to undergo a bilateral hip replacement and advised Frederick that he should not return to work.

Even though Frederick's hip problems persisted, he returned to work on the Champion in January of 1995 because he needed money. His hips caused him constant pain, but he could not take pain medication onboard the ship because Kirby had a policy against drug use by its employees. Due to the constant pain, Frederick cut short his tour of duty. A few months later, Kirby terminated Frederick, alleging that he falsified oil records. After his termination, Frederick consulted an orthopaedic surgeon, Dr. Choung, who eventually performed right hip replacement surgery on Frederick.

On May 23, 1996, Frederick filed a complaint against Kirby, asserting claims of Jones Act negligence, unseaworthiness, maintenance, and cure for injuries to his left knee, both hips, and

> back that he suffered in the slip and fall. He also sought lost wages and penalty wages pursuant to 46 U.S.C. § 10504. After a series of in limine rulings, the district court conducted a jury trial.
>
> After the conclusion of the trial, the jury returned a verdict in favor of Frederick in the amount of $810,903.80. This award included $525,069.00 for unearned wages, maintenance, and cure, and $1,242,760.00 for Jones Act negligence and unseaworthiness, adjusted downward by 77% due to Frederick's pre-existing hip condition. The district court denied Kirby's renewed motion for judgment as a matter of law, or alternatively, motion for a new trial or remittitur. Kirby then appealed to this court.

Frederick v. Kirby Tankships, Inc., 205 F.3d 1277, 1282 (11th Cir. 2000).

As it relates to Frederick's petition, the Eleventh Circuit's opinion held (1) that Frederick was not entitled to penalty wages under 46 U.S.C. § 10504; and (2) that the maximum daily maintenance rate in Frederick's union's collective bargaining agreement ("CBA") with Kirby governed Frederick's claim for maintenance and cure. *See id.* at 1288-92.

REASONS FOR DENYING THE WRIT

A. THE ELEVENTH CIRCUIT CORRECTLY HELD THAT FREDERICK WAS NOT ENTITLED TO PENALTY WAGES UNDER 46 U.S.C. § 10504 BECAUSE THE VESSEL ON WHICH FREDERICK WAS EMPLOYED WAS ENGAGED IN "COASTWISE COMMERCE."

The Eleventh Circuit held that Frederick was not entitled to penalty wages under 46 U.S.C. § 10504 because *The Champion*, the Kirby vessel on which Frederick served, was engaged in "coastwise commerce." Section 10504 plainly excludes vessels engaged in coastwise commerce from its operation. *See* 46 U.S.C. § 10504(d)(1).

Frederick alleges no current conflict among the circuit courts of appeal as to the meaning of "coastwise commerce." Rather, Frederick's basis for asking this Court to review the Eleventh Circuit's decision on this issue is apparently nothing more than his belief that the Eleventh Circuit incorrectly resolved the issue.

Frederick is wrong; the Eleventh Circuit correctly determined that *The Champion* was, at the time of Frederick's injury, "a vessel engaged in coastwise commerce." *Id.* As the Eleventh Circuit aptly observed, section 10504 appears in chapter 105 of title 46 of the U.S. Code. That chapter, including section 10504, applies to "coastwise" (as opposed to "foreign" or "intercoastal," *see* 46 U.S.C. § 10301) voyages. "Coastwise" is defined as

"between a port in one State and a port in another State (except an adjoining State)." 46 U.S.C. § 10501.[1]

The Eleventh Circuit simply used this explicit definition of "coastwise" to hold that "a vessel engaged in coastwise commerce" is "a vessel engaged in commerce that travels between U.S. port in one State and a U.S. port in another, non-adjacent State. . . ." *Frederick*, 205 F.2d at 1290. Since *The Champion* was transporting heating oil between Mississippi and Connecticut, the Eleventh Circuit correctly held that *The Champion* was "a vessel engaged in coastwise commerce" and therefore not subject to the penalty wage statute. *See id.* at 1289.

Frederick attempts to muddle this plain reading of the statute by arguing that *The Champion* was on a "coasting" voyage and not a "coastwise" voyage. However, as the Eleventh Circuit correctly observed, Frederick's argument amounts to a distinction without a difference. The current version of the statute does not refer to coasting voyages; the statute simply covers all voyages from one port to another (with certain exceptions not relevant here).[2] Thus, Frederick mistakenly argues that the Eleventh Circuit construed "coastwise voyages" to exclude "coasting voyages." To the contrary, the Eleventh Circuit

---

[1] Voyages between a port on the Atlantic coast and a port on the Pacific coasts are "intercoastal voyages" governed by chapter 103. *See* 46 U.S.C. § 10301. Thus, they are excluded from the definition of "coastwise" voyages. *See* 46 U.S.C. § 10501 (excluding voyages governed by chapter 103).

[2] This reading of the statute is fully consistent with *Thaxter v. City of New York*, 707 F. Supp. 757 (S.D.N.Y. 1989). As explained above, no one disputes that *The Champion* was on a port-to-port voyage within the meaning of the statute.

plainly held that *The Champion* came within the "port-to-port" definition of section 10501.

The Eleventh Circuit's holding was based not on its determination that *The Champion* was on a coastwise voyage, but on its determination that *The Champion* was engaged in coastwise (that is, port-to-port) commerce. To the extent that Frederick relies on cases construing the former exception for "coastwise trade," 46 U.S.C. § 544, that reliance is misplaced. Section 10501 now provides a clear definition of "coastwise." As the Eleventh Circuit pointed out, the legislative history of the new section 10504(d)(1) confirms that that definition of coastwise was also intended to apply to the exception for "coastwise commerce":

> Coastwise commerce encompasses voyages of vessels from one place in the United States to another, including voyages on the Great Lakes, but not voyages from the Atlantic Coast to the Pacific Coast. . . .

S. Rep. No. 99-24, at 4, *reprinted in* 1985 U.S.S.C.A.N. 25, 28.[3]

In sum, the Eleventh Circuit correctly concluded that *The Champion* fell within the scope of the current penalty wage statute, but that it also came within the exception for vessels engaged in "coastwise commerce." Frederick

---

[3] Notably, neither the new statute nor the foregoing legislative history limits "coastwise commerce" to sheltered bodies of water or harbors. Thus, *Solvang v. M/T Plan Kristine*, 1993 WL 666703 (S.D. Tex. 1993), the only case which supports Frederick's reading of the current penalty wage statute, is entirely unfounded.

cannot show that this decision was even erroneous, let alone in conflict with current cases from other circuit courts of appeal.

B. THE ELEVENTH CIRCUIT CORRECTLY HELD THAT THE CBA'S MAXIMUM DAILY MAINTENANCE RATE OF $15 WAS ENFORCEABLE.

Frederick phrases his second question presented as, "Are Ill or Injured Sailors Who Are Represented By Unions Entitled to the Protection of the Historic Law of Maintenance?" (Pet., at 17) This issue, however, is not the subject of serious dispute. As the Eleventh Circuit plainly recognized, "No private agreement is competent to abrogate the shipowner's duty to pay maintenance." *Frederick*, 205 F.3d at 1291 (citing *De Zon v. American President Lines*, 318 U.S. 660 (1943)). The real question, therefore, is whether, through collective bargaining, seamen and shipowners can contractually place a dollar value on that duty. There is no actual conflict as to this issue. All of the circuits have agreed that a collective bargaining agreement can place a dollar value on the duty to pay maintenance.

The overwhelming majority of circuit courts that have considered the issue before the Eleventh Circuit decided *Frederick*, have answered this question in the affirmative. In *Gardiner v. Sea-Land Serv., Inc.*, 786 F.2d 943, 948-49 (9th Cir.), *cert. denied*, 479 U.S. 924 (1986), the Ninth Circuit held that, although the *right* to maintenance was a common-law right not preempted by federal labor law, a policy of promoting collective bargaining as the

most effective means of achieving workplace improvements meant that the *rate* of maintenance could be fixed by collective bargaining. The Court reasoned that a relatively low daily maintenance rate could be more than offset by other gains (such as increased wages, benefits, and other amenities), and that the seamen themselves, speaking through their unions, were in the best position to determine the optimal package of benefits. *See id.* Not to enforce contractually bargained-for maintenance rates would therefore undermine the collective bargaining process. *See id.*

Since 1986, three other circuit courts of appeal have more or less adopted the reasoning of *Gardiner* and enforced daily maintenance rates established by CBAs. *See Al-Zawkari v. American Steamship Co.*, 871 F.2d 585 (6th Cir. 1989); *Macedo v. F/V Paul and Michelle*, 868 F.3d 519 (1st Cir. 1989); *Baldassaro v. United States*, 64 F.3d 206 (5th Cir. 1995), *cert. denied*, 517 U.S. 1207 (1996). In the present case, the Eleventh Circuit joined this overwhelming majority. *See Frederick*, 205 F.2d at 1291-92.

The only circuit court to reach a slightly different conclusion is the Third Circuit. *See Barnes v. Andover Co.*, 900 F.2d 630 (3d Cir. 1990). The *Barnes* court held that the $8 daily rate established by most CBAs was ordinarily inadequate for food and lodging in Philadelphia. *See id.* at 640. Thus, the court held, a seaman was not necessarily bound by the CBA rate. *See id.* However, even the *Barnes* court acknowledged that maintenance can be a part of a collective bargaining agreement that should be left undisturbed unless shown to be inadequate.

Frederick suggests that this Court must resolve this conflict. Interestingly, however, this Court has already declined an opportunity to decide whether a daily maintenance rate in a CBA is binding. *See Baldassaro v. United States*, 64 F.3d 206 (5th Cir. 1995), *cert. denied*, 517 U.S. 1207 (1996). In *Baldassaro*, the Fifth Circuit expressly recognized conflict with the Third Circuit's decision in *Barnes*. *See* 64 F.3d at 212-13. Nevertheless, this Court declined to review the Fifth Circuit's enforcement of the CBA rate. *See* 517 U.S. 1207.[4]

Although Kirby does not presume to attach a definite meaning to this Court's previous denials of petitions like Frederick's, it is at least possible that this Court believed that whatever conflict exists on this issue is either fact driven or does not warrant this Court's interference. *Cf.* Sup. Ct. R. 10 (referring to "important" issues). Kirby certainly does not mean to belittle the overall importance of the right to maintenance. However, as explained above, there is no dispute as to whether a CBA may abrogate that important right; the courts of appeal agree that it cannot. In light of this recognition, this Court could easily conclude that the application of that rule – that is, determining whether a given rate crosses the line from negotiation to abrogation, is best left to the courts of appeal. *Cf. id.* ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings of the misapplication of a properly stated

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[4] This Court also denied a petition for certiorari prior to the Third Circuit's decision in *Barnes*. *See Gardiner v. Sea-Land Serv., Inc.*, 786 F.2d 943 (9th Cir.), *cert. denied*, 479 U.S. 924 (1986).

rule of law.") Certainly, such a result would respect the regional variations in maintenance costs.

Even if this Court concludes that it should eventually determine at what point a maintenance rate established by a CBA becomes an abrogation of the right to maintenance, this case is a poor vehicle for that determination. The CBA rate in this case is $15. *See Frederick*, 205 F.3d at 1292. Although Frederick repeatedly refers to such a rate as "de minimis," the rates at issue in all the previous circuit court opinions have been significantly lower – almost always $8. *See Baldassaro*, 64 F.3d at 212; *Al-Zawkari*, 871 F.2d at 588; *Gardiner*, 786 F.2d at 948; *see also Barnes*, 900 F.2d at 635 (noting that most CBAs incorporate an $8 rate).[5] Even the Third Circuit recognized that bargaining towards a "realistic" rate is not prohibited. *See Barnes*, 900 F.2d at 640. Indeed, even before a significant downward adjustment, the "realistic" rate in *Barnes* was "between $15 and $16 a day." *Id.* at 641. Had the Third Circuit been faced with the bargained-for rate of $15 at issue in this case, the court might easily have accepted the rate. In other words, even if there is a conflict as to whether an $8-10 CBA maintenance rate is binding, no circuit has held that a $15 rate is unenforceable.

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[5] Even the exception to this otherwise uniform list, *Macedo*, dealt with a rate that was a mere two-thirds ($10) of the rate at issue in this case. *See* 868 F.2d at 522.

C. ANY POTENTIAL EXCEPTION FOR SHIPOWNERS WHO VIOLATE THE TERMS OF A COLLECTIVE BARGAINING AGREEMENT HAS NO APPLICATION TO THIS CASE.

Frederick next suggests that shipowners who violate the terms of a CBA should not be entitled to rely on the maximum daily maintenance rate. (Pet., at 23-24) This does not appear to present a separate question for review. Rather, Frederick's suggestion would simply be an argument on the merits if this Court grants Frederick's petition as to the second question presented.

In any event, no court has actually adopted Frederick's proposed exception. Thus, Frederick does not even attempt to allege that the Eleventh Circuit's decision, *see Frederick*, 205 F.3d at 1292, conflicts with any decision from any other circuit court, by not creating such an exception on this point.

Perhaps more importantly, Frederick's suggested exception had no bearing on the Eleventh Circuit's decision. The Eleventh Circuit declined to create the exception proffered by Frederick because it concluded that "Kirby acted equitably" in attempting to comply with the terms of the CBA. *Id.* Likewise, as the Eleventh Circuit pointed out, the jury found that Kirby did not act willfully or arbitrarily. *See id.*

Thus, the jury and the Eleventh Circuit simply disagreed with Frederick's characterization of Kirby's actions. In other words, even if Frederick is *legally* correct that shipowners who flout the requirements of the CBA should not be allowed to invoke the CBA's maximum

daily maintenance rate,[6] Frederick is, *as a matter of fact*, incorrect that such an exception would apply to Kirby in this case. This Court rarely grants certiorari to review alleged factual errors. *See* Sup. Ct. R. 10.

D. THE ELEVENTH CIRCUIT WAS NOT ASKED TO DETERMINE THE PROPER STANDARD FOR AN AWARD OF CONSEQUENTIAL DAMAGES FOR FAILURE TO PAY MAINTENANCE AND CURE.

Finally, Frederick asks this Court, "What is the correct legal standard for awarding consequential damages following the shipowner's denial of M & C?" (Pet., at 25) In this case, that question can have nothing more than an abstract answer. This Court reviews concrete decisions; it does not answer abstract questions.

Frederick's question is an abstraction in this case because the Eleventh Circuit did not expressly decide whether the jury was properly instructed on the availability of consequential damages for failure to pay maintenance and cure. The Eleventh Circuit did not address this issue for the simple reason that it was not asked or required to do so.

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[6] At the risk of delving too far into the merits of Frederick's argument, a CBA deals with much more than the maximum daily maintenance rate. In the overall scheme of the CBA, failure to make maintenance payments on a weekly basis and failure to pay wages for partial days worked may be relatively minor. That is, failure to comply with such provisions does not mean that a seaman is deprived of the entire "quid pro quo" of the CBA. *See Frederick*, 205 F.3d at 1291-92.

The jury was instructed that they could only award consequential damages stemming from a failure to pay maintenance and cure if they found that Kirby acted "willfully and arbitrarily" in withholding such payments:

> Therefore, in order to award additional damages to the Plaintiff for a willful failure to [sic] the shipowner to provide maintenance and cure, you must find:
>
> First: That the Plaintiff was entitled to maintenance and cure;
>
> Second: That is [sic] was not provided.
>
> Third: That Defendant **willfully and arbitrarily** failed to provide cure up to the time that the seaman reached maximum cure; and
>
> Fourth: That such failure resulted in injury to the Plaintiff.

(Petitioner's App. C, at 34a-35a) (emphasis added) Frederick did not object to the above instruction at the trial level, therefore the legal standard applied by the district court was not an issue for the Eleventh Circuit nor is it an issue for this Court. As the Eleventh Circuit recognized, and as Frederick admits, the jury found that Kirby did not act willfully and arbitrarily. In the absence of any evidence of jury confusion, a jury is presumed to have followed the court's instructions. *See, e.g., Weeks v. Angelone*, 120 S. Ct. 727 (2000); *Richardson v. Marsh*, 481 U.S. 200 (1987). Frederick offered no evidence of jury confusion.[7] In the same vein, the district court noted that

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[7] Frederick's assertion that the district court determined that the jury had, in fact, used a "reasonable person" standard,

the jury "diligently followed the instructions of the court." (Petitioner's App. B, at 30a)

Thus, the jury did not award Frederick any consequential damages for the failure to pay maintenance and cure. Had Frederick wished to challenge the award on these grounds, he could have easily moved for a new trial in the district court and, if necessary, raised the issue on cross-appeal in the Eleventh Circuit. Frederick did neither.

In short, the Eleventh Circuit assumed, but was not asked to decide, the correct standard for an award of consequential damages. As a result, there is simply no decision for this Court to review.

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and that their award had included consequential damages for failure to pay maintenance and cure, is completely unsupported by the district court's order. As mentioned above, the district court noted that the jury "diligently followed" its instructions. (Petitioner's App. B)

CONCLUSION

For the foregoing reasons, Respondent, Kirby Tankships, Inc., asks that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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